No. 85-1806

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-5694
* Counsel of Record

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QUESTIONS PRESENTED

1. For purposes of determining whether Eleventh Amendment immunity bars a pendent state claim, does federal law govern the question of whether the State is the real party in interest even though state law supplies the substantive rule of decision?
2. Whether Article III's grant of federal jurisdiction authorizes the Court of Appeals to reinstate previously dismissed pendent state law claims against certain defendants where plaintiffs failed to appeal the District Court's dismissal of the underlying federal claims against those defendants?
3. Whether the Court of Appeals erred in ruling that the District Court abused its discretion by dismissing plaintiffs' pendent claims on the alternative ground that combining Eighth Amendment and common law negligence claims for trial might lead to jury confusion and was impractical?

LIST OF PARTIES

The following is a list of all parties involved in this Petition for a Writ of Certiorari.

A. PETITIONERS:

1. Gayle Franzen, in his capacity as Director of the Illinois Department of Corrections.
2. Dennis J. Wolff, in his capacity as Warden of Joliet Correctional Center.
3. Richard R. Hert, in his capacity as Chief of Security of the Joliet Correctional Center.
4. William M. Hartgrove, in his capacity as correctional officer.
5. James A. Krug, in his capacity as correctional officer.
6. John B. Tipton, in his capacity as correctional officer.

B. RESPONDENTS:

1. Junior Ray Duckworth
2. William Woodward
3. Michael Mullins
4. Daniel Hines
5. Freddie Brown
6. Emmett Leatherwood
7. Rudolf Moffett
8. Robert Osborne
9. Ben Cantrell
10. James Long
11. James Tirrell
12. Theodore Tirrell
13. Sherman Tirrell
14. Charles Campbell
15. Dresden Faulkner
16. Dennis Walker
17. Michael Rucker
18. Ward Quaco
19. Stanley Lathrop
20. Robert Foster
21. LaMont Hurrins

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 780 F.2d 645 (7th Cir. 1985) and is reproduced in the Appendix at App. A-1. The opinion of the United States District Court for the Southern District of Illinois is not reported; it is reproduced in the Appendix at App. D-1.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on December 17, 1985. On January 2, 1986 both plaintiffs and defendants timely filed petitions for rehearing with suggestion for rehearing *en banc*. Both petitions were denied on February 5, 1986. (App. B-1). This Petition for a Writ of Certiorari is filed within 90 days of that date. Jurisdiction of the Court is invoked under 28 U.S.C. §1254(1).

It is petitioners' position that the Court of Appeals by virtue of Article III and the Eleventh Amendment to the United States Constitution lacked jurisdiction over plaintiffs' pendent state claims.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Ill.Rev.Stat. ch. 37, par. 439.8 provides:

> The [Illinois] court [of claims] shall have exclusive jurisdiction to hear and determine the following matters:
>
> (a) All claims against the state founded upon any law of the State of Illinois, or upon any regula-

tion thereunder by an executive or administrative officer or agency, other than claims arising under the Workers' Compensation Act or the Workers' Occupational Diseases Act, or claims for expenses in civil litigation.

(b) All claims against the state founded upon any contract entered into with the State of Illinois.

(c) All claims against the state for time unjustly served in prisons of this State where the persons imprisoned shall receive a pardon from the governor stating that such pardon is issued on the ground of innocence of the crime for which they were imprisoned; provided, the court shall make no award in excess of the following amounts: for imprisonment of 5 years or less, not more than $15,000; for imprisonment of 14 years or less but over 5 years, not more than $30,000; for imprisonment of over 14 years, not more than $35,000; and provided further, the court shall fix attorney's fees not to exceed 25% of the award granted.

(d) All claims against the State for damages in cases sounding in tort, if a like cause of action would lie against a private person or corporation in a civil suit, and all like claims sounding in tort against the Medical Center Commission, the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities; provided, that an award for damages in a case sounding in tort, other than certain cases involving the operation of a State vehicle described in this paragraph, shall not exceed the sum of $100,000 to or for the benefit of any claimant. The $100,000 limit prescribed by this Section does not apply to an award of damages in any case sounding in tort arising out of the operation by a State employee

of a vehicle owned, leased or controlled by the State. The defense that the State or the Medical Center Commission or the Board of Trustees of the University of Illinois, the Board of Trustees of Southern Illinois University, the Board of Regents of the Regency Universities System or the Board of Governors of State Colleges and Universities is not liable for the negligence of its officers, agents, and employees in the course of their employment is not applicable to the hearing and determination of such claims.

(e) All claims for recoupment made by the State of Illinois against any claimant.

(f) All claims pursuant to the "Law Enforcement Officers and Firemen Compensation Act".

(g) All claims filed pursuant to the Crimes Victims Compensation Act.

(h) All claims pursuant to the "Illinois National Guardsman's and Naval Militiaman's Compensation Act".

(i) All claims authorized by Section 14.1(a) of the Illinois Administrative Procedure Act for the expenses incurred by a party in a contested case on the administrative level.

Ill.Rev.Stat. ch. 38, par. 1003-7-4 provides:

The Department [of Corrections] shall establish rules and regulations for the protection of the person and property of employees of the Department and every committed person.

Ill.Rev.Stat. ch. 127, par. 801 provides:

Except as provided in the "Illinois Public Labor Relations Act", enacted by the 83rd General Assembly, or except as provided in "AN ACT to create the Court of Claims, to prescribe its powers and duties, and to repeal AN ACT herein named", filed July 17, 1945, as amended, the State of Illinois shall not be made a defendant or party in any court.

STATEMENT OF THE CASE

1. Claims Brought By The Prisoners

This case arises out of an accidental prison bus fire on November 29, 1979. Twenty-one prisoners filed several complaints which were eventually consolidated in the United States District Court for the Southern District of Illinois.

Each prisoner brought a civil rights claim against six employees and officials of the Illinois Department of Corrections. At the end of a three-week trial in October, 1984, the jury exonerated the three prison guards (i.e., William M. Hartgrove, James A. Krug, and John B. Tipton) who had been in charge of the prison bus on the day of the fire. The prisoners filed notices of appeal to the Court of Appeals seeking to appeal the jury findings in favor of the prison guards; however, the prisoners presented no argument contesting the validity of the jury verdicts. Accordingly, the Court of Appeals held that the prisoners had failed to appeal the civil rights jury verdicts in favor of the prison guards. (App. A-15; 780 F.2d at 655)

The jury found defendants Gayle M. Franzen, former Director of the Illinois Department of Corrections; Dennis J. Wolff, former Warden of the Joliet Correctional Center; and Richard R. Hert, former Chief of Security for the Joliet Correctional Center, liable in the total amount of $561,000 for actual and punitive damages on the civil rights claims. On appeal, the Seventh Circuit reversed the jury verdicts against the three administrative officials. The Court of Appeals held that there was "no evidence" of any wrongdoing by Director Franzen. (App. A-5; 780

F.2d at 650). As to the other two officials, the Court of Appeals held that the security modifications to the prison bus "were reasonable." (App. A-14; 780 F.2d at 654) Moreover, the Court of Appeals found that even six years after the accident "it is still not clear what the defendants should have done" to avert the possibility of harm. (App. A-13; 780 F.2d at 654)

The prisoners also brought pendent negligence claims; some of the prisoners also brought willful and wanton misconduct claims. Six of the prisoners sued all six defendants on pendent state claims; the remaining fifteen prisoners sued only four of the defendants on pendent claims.[1]

Furthermore, certain of the prisoners sued Prevost Car, Inc., the manufacturer of the bus, on a products liability claim that Prevost had manufactured its bus in an unreasonably dangerous and defective condition. The prisoners' product liability claims against Prevost were severed from the remainder of the case. Some currently remain pending before the District Court awaiting trial.

All of the foregoing claims were brought in the United States District Court. In addition to the federal court litigation, nineteen of the twenty-one prisoners initiated lawsuits directly against the State of Illinois in the Illinois Court of Claims based upon the same accident which is

[1] Plaintiffs Long, Moffett, J. Tirrell, T. Tirrell, Leatherwood, Foster, Lathrop, S. Tirrell, Faulkner, Campbell, Hurrins, Brown, Quaco, Walker, and Rucker never sued Dennis Wolff or Richard Hert on any pendent state law claim. (See complaints at R. 16 and R. 39).

the subject of this case.[2] Several of the prisoners also filed state court complaints in Livingston County, Illinois Circuit Court alleging product liability and negligence claims against the bus manufacturer's agent and the corporation that installed the security modifications on the bus. (Exhibits B and C to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985).

2. Proceedings On The Pendent Claims In The District Court.

Plaintiffs sued Gayle Franzen "in his capacity as Director of the Illinois Department of Corrections." The other defendants were sued in their official capacity by designating each named defendant by job title. The same designations appear in the part of the complaint that asks for damages. (App. E-12) Moreover, plaintiffs based their state law claims on Ill.Rev.Stat. ch. 38, par. 1003-7-4 which imposes statutory duties upon the Department of Corrections, not individual corrections employees or administrators. That provision in its entirety states as follows:

> "The Department shall establish rules and regulations for the protection of the person and property of employees of the Department and every committed person."

The gist of plaintiffs' complaints is that the three senior administrative corrections officials failed to promulgate adequate prison bus regulations and the three prison

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[2] Nineteen of the prisoners filed the required Illinois Court of Claims' notice of claim for personal injuries. (Exhibit A to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985; see e.g., App. F-9). One of those nineteen prisoners filed a complaint in the Illinois Court of Claims. (App. F-1).

guards failed to adequately enforce those departmental regulations which did exist.

The corrections officials and employees moved to dismiss the pendent state claims on the basis of the Eleventh Amendment jurisdictional bar. The District Court Judge, Judge William L. Beatty, who prior to his tenure as a federal judge served as an Illinois state court judge for eleven years, agreed with defendants that the determination as to who is the real party in interest on a pendent state claim is governed by state law. Applying Illinois law, the District Court held that the State (rather than the individually named defendants) is the real party in interest. Accordingly, on April 18, 1984 the District Court dismissed the prisoners' pendent claims on Eleventh Amendment grounds. (App. D-1).

The prisoners never sought leave to amend their complaint to allege that the prison officials and employees were acting outside the scope of their employment.

At the start of the civil rights trial on October 1, 1984, all twenty-one plaintiffs asked the District Court to reconsider its April 18, 1984 interlocutory ruling which dismissed the pendent state law claims. (Tr. 36-37) Again on October 12, 1984, the prisoners asked the District Court to reinstate the state law claims. (Tr. 1003-1004). The District Court held that it would not be "practical" to add state law claims in this Eighth Amendment civil rights case. (Tr. 1004).

On February 1, 1985 the District Court, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, certified the civil rights and pendent state claims judgments for an immediate appeal. (App. C-1).

3. The Court Of Appeals' Decision On The Pendent Claims.

The Seventh Circuit held that for purposes of determining whether the Eleventh Amendment bar applies, the issue of whether the State of Illinois (rather than individual state officials) is the real party in interest is governed by federal law for both the civil rights and pendent state claims. The Court held:

> "That leaves only the question whether the judge was right to dismiss the pendent claim. He thought it barred by the Eleventh Amendment. But if, as he and we believe, the civil rights claim was brought against the defendants in their individual capacities, we can think of no reason for believing that the pendent negligence claim was brought against them in their official capacities . . ." (App. A-16; 780 F.2d at 656)

The Seventh Circuit next considered the District Court's suggestion that the pendent claims would have been dismissed anyway because a jury in a case with multiple plaintiffs and defendants might become confused if it had to consider each prison officials' liability under both Eighth Amendment and negligence standards. (*Id.*) The Court of Appeals held that the trial of twenty-one cruel and unusual punishment claims together with twenty-one negligence claims "has never been thought a source of serious confusion." (*Id.*) The Court of Appeals further held that the District Court had grossly abused its discretion in dismissing the pendent state claims in that there was almost a complete factual overlap between the federal and state claims. The Court stated:

> "while the district judge has a broad discretion in making what amounts to a managerial judgment on whether to allow a plaintiff to bring one case in federal court or force him to litigate his state claim in

> state court, we cannot uphold an exercise of discretion so flawed as the one before us." (App. A-16-17; 780 F.2d at 656)

Finally, the Court of Appeals held that inasmuch as it was uncertain as to whether the limitations period for the pendent state claims had expired, the pendent state claims must be reinstated as to all six prison officials and employees. The prisoners' failure to appeal the District Court's dismissal of the underlying federal claims against the three prison guards was not a jurisdictional bar to reinstating the pendent state claims against those guards. (App. A-18; 780 F.2d at 657) The Court held:

> "With regard to retention of a pendent claim in order to prevent the bar of the statute of limitations from falling, it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial (as in the case of the three guards) or after appeal (as in the case of the three officials who are the appellants)." (*Id.*)

REASONS FOR GRANTING THE WRIT

THIS COURT SHOULD EXERCISE ITS SUPERVISORY AUTHORITY TO RESOLVE WIDELY CONFLICTING DECISIONS CONCERNING RECURRING ELEVENTH AMENDMENT AND ARTICLE III JURISDICTIONAL ISSUES AS WELL AS SET FORTH THE PROPER SCOPE OF REVIEW OF DISCRETIONARY DISTRICT COURT DECISIONS DISMISSING PENDENT STATE CLAIMS.

The effect of the Seventh Circuit's decision is to permit State of Illinois prisoners to sue state officials in federal court even though lawsuits on the identical claims against the same officials may not be brought in Illinois state courts of general jurisdiction. Although the prisoners may sue the State of Illinois in the Illinois Court of Claims, and indeed some have done so, punitive damages are not available in that forum. cf. *Laningham v. United States*, 2 Cl. Ct. 535, 558 (1983) (punitive damages against United States not allowed). Consequently, the Seventh Circuit's decision encourages a practice of forum shopping in order to obtain punitive damages. Therefore, the effect of the Seventh Circuit's decision is to turn the clock back 50 years to the days before this Court's *Erie R. Co. v. Tompkins* (304 U.S. 64, 74 (1938)) decision rejected the "mischievous results" of the *Swift v. Tyson* (41 U.S. (16 Pet.) 1 (1842)) doctrine.

Second, the Court of Appeals' decision holding that for purposes of reinstating previously dismissed pendent state claims it does not matter that the underlying federal claims against the defendants were not appealed to the Court of Appeals conflicts with this Court's subsequent decision in *Bender v. Williamsport Area School District*, 475 U.S. ____, 106 S.Ct. 1326 (1986) (appeal dismissed for want of jurisdiction).

Third, the Seventh Circuit held the District Court's decision declining to exercise jurisdiction over pendent state claims based upon practical considerations to be clearly "flawed." (App. A-17; 780 F.2d at 656). The Court of Appeals set forth a virtual ironclad rule requiring the District Court to retain jurisdiction over pendent claims wherever a substantial factual overlap exists between the federal and state claims. Not only does this result conflict with the tenor of broad District Court discretion prescribed in *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966), it permits plaintiffs to try state tort claims in federal court on the basis of pendent jurisdiction simply by asserting a weak, yet triable, federal claim in their complaint. Thus, while this Court has made clear that state tort claims must not be allowed to enter the federal courthouse through the front door of federal claim jurisdiction (*Estelle v. Gamble*, 429 U.S. 97, 107 (1976)), the Court of Appeals has encouraged plaintiffs to enter through the side door of pendent claim jurisdiction despite the lack of merit in plaintiffs' underlying federal claims.

Pendent state claims may potentially be filed in virtually any civil rights case. Civil rights claims represent over twenty-nine percent of the civil caseload of the United States Court of Appeals (calculated from statistics in the Annual Report of the Director of the Administrative Office of the U.S. Courts for the period ended June 30, 1985; Appendix 1, Table B-1A). The actual pervasiveness of pendent jurisdiction is likely to be much greater since pendent state claims are obviously not limited to cases having federal civil rights claims as the main claims; they may potentially supplement almost any federal claim. Consequently, this Court should exercise its supervisory authority to resolve the recurring unsettled jurisdictional issues presented by this case.

I.

THE LOWER COURT'S HOLDING THAT FEDERAL LAW GOVERNS WHETHER A STATE IS THE REAL PARTY IN INTEREST ON STATE LAW CLAIMS CONFLICTS WITH PRIOR DECISIONS OF THIS COURT AND LEADS TO A DIFFERENCE IN SUBSTANTIVE OUTCOME DEPENDING UPON THE FORUM CHOSEN BY PLAINTIFFS.

A. Widely Disparate Holdings Exist Among The Lower Courts And This Court Concerning Whether The State Is The Real Party In Interest In The Context Of State Law Claims.

Although it is beyond dispute that a federal court is "bound to apply state law" to pendent state claims (*United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966)), the Circuits are split as to whether federal or state law governs the real party in interest issue in the context of the Eleventh Amendment immunity bar. The Court of Appeals below held that federal law governs. *Duckworth v. Franzen*, 780 F.2d 645, 656 (7th Cir. 1985) (App. A-16) (real party in interest issue same for state law claims as for federal civil rights claims). The Third Circuit also expressly held that the issue is governed by federal law. *Harris v. Pennsylvania Turnpike Commission*, 410 F.2d 1332, 1333-34 n. 1 (3d Cir. 1969), *cert. denied*, 396 U.S. 1005 (1970). The Ninth Circuit held that federal courts may consider state decisions but the issue is ultimately one which the federal courts must answer. *DeLong Corp. v. Oregon State Highway Commission*, 233 F.Supp. 7, 10 (D. Ore. 1964), *aff'd*, 343 F.2d 911, 912 (9th Cir.), *cert. denied*, 382 U.S. 877 (1965). The Fifth Circuit held that federal courts must look to state law for guidance. *Aerojet-General Corp. v. Askew*, 453 F.2d 819, 828 (5th Cir. 1971), *cert. denied*, 409 U.S. 892 (1972). The Tenth Circuit held state law is decisive. *Korgich v.*

Regents of New Mexico School of Mines, 582 F.2d 549, 551 (10th Cir. 1978).

In *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984) this Court noted that its prior decisions as to whether the State is the real party in interest "have not been entirely consistent." In *Pennhurst*, however, no party questioned that the state officials in that case were acting in their official capacity. (465 U.S. at 109 n. 17). In earlier decisions this Court squarely held that the Eleventh Amendment issues of consent (*Palmer v. State of Ohio*, 248 U.S. 32, 34 (1918)) and waiver (*Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459, 467 (1945)) should be governed by state law where state law otherwise applied. Compare *Parden v. Terminal R. of Alabama State Docks Dept.*, 377 U.S. 184, 194-96 (1964) (Eleventh Amendment waiver issue governed by federal law where case involved federal legislation concerning amenability to suit). Moreover, this Court in *Ford Motor Co.* applied state law to the real party in interest question where state concerns were at issue. 323 U.S. 459, 462-64 (1945).

B. The Lower Court's Holding Returns The Litigation Of Pendent State Claims Against State Employees To The Days When Forum Shopping Prevailed Under *Swift v. Tyson*.

The Seventh Circuit's holding that federal law must govern the real party in interest issue in the context of determining whether Eleventh Amendment immunity applies leads to a difference in outcome depending upon the forum chosen by the plaintiffs. It permits prisoners to sue state prison officials in federal court on state claims where the identical lawsuit against the same officials would not be permitted in Illinois courts of general jurisdiction. Under

Illinois law, the State of Illinois must be held to be the real party in interest unless the complaint alleges the named state employees acted maliciously and outside the scope of their authority. *Hoffman v. Yack*, 57 Ill.App.3d 744, 748, 373 N.E. 2d 486, 490 (5th Dist.), *leave to appeal denied*, 71 Ill.2d 603 (1978); *People ex rel. Maciuba v. Cheston*, 25 Ill.App.3d 224, 323 N.E. 2d 40 (1st Dist. 1974). Indeed, even if a plaintiff alleges that a claim has been brought against a named defendant individually, that is not sufficient to make the claim one against the individual rather than the State. In the absence of an allegation of wrongful conduct outside the scope of the employee's authority, the real party in interest is the State.[3]

Moreover, the issue of state indemnification of state employees, discussed by the Court of Appeals, is wholly separate from and independent of the real party in interest determination as set forth in *Hoffman v. Yack* and *People ex rel. Maciuba v. Cheston*. Petitioner state employees and officials in this case no longer rely on the Illinois state employees indemnification act as a basis for Eleventh Amendment immunity.

---

[3] Illinois law focuses on whether the allegedly wrongful conduct is claimed to be outside the employee's scope of authority rather than the technical issue of whether the claim has been plead against the state employee in his official or individual capacity. Accordingly, the Seventh Circuit's discussion (App. A-5; 780 F.2d at 650) of the alleged requirement to substitute named officials pursuant to Fed.R.Civ.P. 25(d)(1) or Fed.R.App. P. 43(c) is not germane to pendent claims under Illinois law. That is, the Seventh Circuit erroneously relied upon federal rules even though the applicable law in the context of a pendent claim is state law. In any event, those rules by their terms provide for automatic substitution of defendants; they further provide that no consequences follow from the failure to move to substitute the named defendants. *Brandon v. Holt*, 469 U.S. ____, 105 S.Ct. 873, 877 & n. 18 (1985).

Respondent prisoners' pendent state claims do not allege that petitioner prison officials and employees acted outside the scope of their authority. To the contrary, the prisoners rely on the statutory authority of the Illinois Department of Corrections (Ill.Rev.Stat. ch. 38, par. 1003-7-4) in attempting to allege pendent state claims against these Illinois corrections officials and employees. Therefore, plaintiffs could not bring the very state claims alleged in this case in a state court of general jurisdiction. Rather, such state law claims must be brought against the State of Illinois in the Illinois Court of Claims where punitive damages are not available. Under Illinois law, the State of Illinois may only be sued in the Illinois Court of Claims because that court has exclusive jurisdiction of claims brought against the State based upon a violation of Illinois law or departmental regulations or upon claims sounding in tort. (Ill.Rev.Stat. ch. 37, pars. 439.8(a), 439.8(d); ch. 127, par. 801).

Consequently, the Seventh Circuit's decision in this case permits prisoners to obtain punitive damages on state law claims in federal court although punitive damages are not obtainable in any Illinois court. Thus, the unfortunate result of the Seventh Circuit's decision is to return litigation of state law claims against state officials to the days when forum shopping prevailed during the rule of *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842).

It was just such evils as rampant forum shopping and the consequent inequitable administration of state law that caused this Court nearly fifty years ago to reject the politically and socially defective *Swift v. Tyson* doctrine. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 74-75 (1938). With only minor paraphrasing, Justice Brandeis' words written on behalf of this Court in *Erie* aptly express the unfairness of the practical results of the Seventh Circuit's decision:

> "*Swift v. Tyson* introduced grave discrimination by [prisoners] against [prison officials]. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the [prisoner]." (*Id.*).

C. This Court's Concern In *Erie R. v. Tompkins* With Mischievous Results Applies Even More Strongly To The Sensitive Issue Of A State's Duty To Provide Adequate Prison Security.

The *Erie* case dealt with a personal injury claim between two private parties. It did not concern the sensitive and delicate issues raised by a federal court's rendering judgments in hindsight as to how state prison officials should have balanced the questions of security and safety in transporting dangerous felons across the state's highways. Indeed, on the day of the accident in this case, the bus was carrying prisoners whose felonies included 8 murders, 7 armed robberies, 4 armed violence convictions, 3 rapes, 1 aggravated kidnapping, and 1 deviate sexual assault. (Tr. 238-39). Moreover, there had been a long history of escapes from Illinois prison buses. (App. A-14; 780 F.2d at 654). The security procedures at issue in this case had to take into account the legitimate safety needs of the community, the bus driver, the guards, and the other prisoners. (*Id.*) Accordingly, the Court of Appeals held that even six years after the accident "it is still not clear what the defendants should have done" to avert the possibility of harm. (App. A-13; 780 F.2d at 654).

Consequently, the Seventh Circuit's decision is particularly unfortunate for prison officials who should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed

to preserve internal order and to maintain institutional security. *Bell v. Wolfish*, 441 U.S. 520, 547 (1979).

To allow prisoners to obtain punitive damages on pendent state claims in federal court where punitive damages are not obtainable in any State of Illinois court conflicts with this country's basic values of federalism and comity which underlie our dual sovereignty system of government.

This Court should grant this Petition and issue a Writ of Certiorari in order to resolve the issue of whether a federal court should render real party in interest determinations in the context of pendent state claims against state officials which result in the application of substantive law in federal court directly at odds with applicable state law.

II.

THE COURTS OF APPEALS REQUIRE THIS COURT'S GUIDANCE CONCERNING THE CONSTITUTIONALITY OF REINSTATING PREVIOUSLY DISMISSED PENDENT CLAIMS WHERE THE UNDERLYING FEDERAL CLAIMS HAVE NOT BEEN APPEALED.

The jury found in favor of the three prison guards; accordingly, the District Court dismissed the prisoners' federal claims against these three defendants. The prisoners never perfected their appeal against the guards. Thus there were no federal claims against the guards pending before the Court of Appeals. The prisoners, however, did appeal the federal claims against the three administrative officials and the state law claims as to all six corrections defendants.

The Seventh Circuit decision reinstated the pendent state claims as to all six defendants including the three guards against whom there were no longer any underlying federal claims pending. The Court of Appeals held (App. A-18; 780 F.2d at 657):

> "it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial . . . or after appeal."

This result is in conflict with the principle set forth in *Safeco Insurance Co. of America v. Guyton*, 692 F.2d 551, 556 (9th Cir. 1982): "The existence of pendent jurisdiction should be re-evaluated throughout the pendency of litigation." The Ninth Circuit expressly held that the failure to appeal the District Court's dismissal of a federal claim precluded the Court of Appeals from permitting pendent or ancillary jurisdiction over a nonfederal claim.

Moreover, after the Seventh Circuit's decision in this case, this Court decided *Bender v. Williamsport Area School District*, 475 U.S. ____ , 106 S.Ct. 1326 (1986). In *Bender* this Court rejected the proposition that wherever Article III jurisdiction exists in the District Court, the Court of Appeals may ignore the issue of jurisdiction on appeal. This Court's *Bender* decision made clear that compliance with the strict requirements of Article III are just as necessary on appeal as they are in the District Court. (106 S.Ct. at 1335) Thus, the Seventh Circuit's decision holding that for purposes of pendent jurisdiction it does not matter that the federal claims against the guards were not pending in the Court of Appeals directly conflicts with this Court's decision in *Bender*.

Furthermore, the Seventh Circuit's implicit holding that the Article III jurisdictional requirement may be relaxed when the state statute of limitations may have expired (App. A-18; 780 F.2d at 657) is in conflict with the Fourth Circuit's decision in *Ottensmeyer v. Chesapeake & Potomac Telephone Co. of Maryland*, 756 F.2d 986, 994 n. 14 (4th Cir. 1985) which held that there is no rule whereby district courts must exercise pendent jurisdiction over time-barred state claims. It is also in conflict

with the Eleventh Circuit's decision in *Quality Foods v. Latin American Agribusiness Development Corp.*, 711 F.2d 989, 1000 (11th Cir. 1983) which held that it is not the function of a federal court to rescue a party's pendent claims from the possible expiration of the limitations period. By contrast in this case, back in 1980 nineteen of the twenty-one respondent prisoners timely commenced Illinois Court of Claims litigation concerning the same accident which is the subject of this action. (Exhibit A to Defendants-cross-appellees' motion filed in the Court of Appeals on October 18, 1985).

This Court should grant this Petition for a Writ of Certiorari in order to resolve whether the Court of Appeals may reinstate previously dismissed pendent state claims where plaintiffs have failed to appeal the District Court's dismissal of the underlying federal claims to the Court of Appeals. Alternatively, petitioners pray that this Court grant this Petition and either summarily reverse the decision of the Seventh Circuit reinstating the pendent state claims against prison guards William M. Hartgrove, James A. Krug, and John B. Tipton or vacate the judgment of the Seventh Circuit concerning the pendent claims and remand this case for reconsideration in light of this Court's decision in *Bender v. Williamsport Area School District.*

III.

CONFUSION EXISTS AMONG THE COURTS OF APPEALS AS TO THE DEGREE OF DEFERENCE TO BE ACCORDED A DISTRICT COURT'S DECISION TO DISMISS PENDENT STATE CLAIMS FOR PRACTICAL REASONS.

Although the Seventh Circuit acknowledged that the District Court is to be accorded broad discretion in deciding whether to retain pendent claims, the Court of Ap-

peals found the District Court's exercise of discretion in this case to be clearly "flawed." (App. A-17; 780 F.2d at 656). The Seventh Circuit established virtually an absolute rule that wherever there is "almost complete factual overlap between the main and pendent claims" the pendent claims must be retained by the District Court. (App. A-16; 780 F.2d at 656) The lower court also held that potential jury confusion arising from differing standards of liability "has never been thought a source of serious confusion." (*Id.*)

These results conflict with the broad principles of discretionary pendent jurisdiction set forth by this Court in both *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966) and *Moor v. County of Alameda*, 411 U.S. 693, 715-17 (1973). In *Moor* this Court, in affirming the District Court, emphasized that the trial judge is to be accorded broad discretion where he or she declines to exercise pendent jurisdiction. In particular, this Court noted that "the likelihood of jury confusion" was an "entirely appropriate" point for the District Court to consider. (*Id.* at 716). Under Illinois law, negligence claims are decided under the doctrine of comparative negligence which greatly complicates the jury instructions. See *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886 (1981).

Also directly at odds with the Seventh Circuit is the Federal Circuit's standard of review of a District Court's decision not to exercise pendent jurisdiction. The Federal Circuit allows the District Court judge a wide degree of latitude; the District Court may properly be found to have abused its discretion only if "no reasonable man" would take the view adopted by the trial court. *Verdegaal Brothers, Inc. v. Union Oil Co. of California*, 750 F.2d 947, 952 (Fed. Cir. 1984) (patent and state unfair competition case). On the other hand, the *Verdegaal* decision notes some lower court authority in favor of exercising pendent jurisdiction in federal civil rights actions. (*Id.* at 951) See e.g.,

Sparks v. Hershey, 661 F.2d 30 (3d Cir. 1981) (reversed district court's dismissal of state claims pendent to federal civil rights claim). Yet this Court rejected pendent jurisdiction in the civil rights case of *Moor v. County of Alameda*.

The lower courts are in need of this Court's guidance concerning the appropriate standard for the District Court's decision whether to exercise pendent jurisdiction as well as the proper degree of deference to be accorded by the Court of Appeals in reviewing the District Court's discretionary decision to decline pendent jurisdiction for practical reasons.

CONCLUSION

This Court should resolve whether state or federal law governs the determination of the real party in interest issue where pendent claims are brought against state officers. The lower court's resurrection of the politically and socially defective *Swift v. Tyson* doctrine directly conflicts with the values underlying our country's dual sovereignty system of government. Moreover, this Court should resolve the important Article III jurisdictional issue as to whether the existence of pendent jurisdiction must be reevaluated throughout the pendency of the litigation or merely at the time of the initial filing of the complaint in the District Court. Finally, the lower courts require this Court's guidance as to whether the District Court may properly rely on practical reasons in declining to exercise pendent jurisdiction despite substantial factual overlap between plaintiffs' federal and state claims.

Resolution of the three jurisdictional issues raised in this case will resolve questions arising in a large percentage of the entire federal civil caseload.

For the foregoing reasons, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari and allow full review of the Seventh Circuit's decision reinstating the pendent claims. Alternatively, petitioners pray that this Court grant their Petition and either summarily reverse the judgment of the Seventh Circuit reinstating the pendent state claims, or vacate the judgment of the Seventh Circuit as to the reinstatement of the pendent claims and remand this case for reconsideration in light of this Court's recent decision in *Bender v. Williamsport Area School District.*

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694

* Counsel of Record

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No. 85-1806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694
* Counsel of Record

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Nos. 85-1010, 85-1053, 85-1084, 85-1095

JUNIOR RAY DUCKWORTH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

GAYLE FRANZEN, et al.,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 80 C 5057—**William L. Beatty**, *Judge.*

ARGUED OCTOBER 31, 1985—DECIDED DECEMBER 17, 1985

Before BAUER, POSNER, and EASTERBROOK, *Circuit Judges.*

POSNER, *Circuit Judge.* In November 1979 a bus used to transport prisoners between Illinois prisons caught fire from unknown causes. When the fire broke out, the 35 prisoners in the bus were in handcuffs, with all the prisoners on each side of the aisle being joined together by a chain running through the handcuffs. For reasons of security all exits but the front door of the bus had been sealed and there was a metal screen (like a mesh fence), probably locked (but the record is not clear on this), between the passenger area and the front door. When the bus filled with dense smoke each group of prisoners tried

to rise and make its way to the front exit, but only one prisoner (who had managed to slip out of his handcuffs) succeeded in getting out, and a guard thrust him back into the bus. Eventually guards equipped with gas masks cut through the chains and brought the prisoners out. One prisoner died from the ordeal. Others suffered serious, and in at least one case permanent, lung injury. Twenty-one of the injured prisoners brought suit against three prison officials and three guards under section 1 of the Civil Rights Act of 1871 (now 42 U.S.C. § 1983), charging that by failing to take effective precautions against the consequences of a fire on the bus the defendants had visited cruel and unusual punishment on the plaintiffs in violation of the Eighth Amendment, which has been held applicable to the states under the due process clause of the Fourteenth Amendment. The complaint included a pendent claim against these six defendants for negligence and a diversity claim based on products liability against a seventh defendant, the manufacturer of the bus.

The district judge severed the claim against the bus company, and it remains in the district court, awaiting trial. He dismissed the pendent claim. The civil rights claim was tried to a jury, which awarded damages totaling $561,000 (including punitive damages) against three of the defendants—Franzen, the head of the Illinois prison system at the time of the fire; Wolff, the then warden of Joliet prison, the distribution point for prisoners entering the Illinois prison system and the place where the bus was kept; and Hert, the then director of security at Joliet—but exonerated the three guards who had been in charge of the bus when the fire occurred. Although the judgment is not final in the sense of winding up the entire litigation—for the plaintiffs' claim against the bus company has yet to be tried—the judge quite properly has certified the judgment for an immediate appeal under Rule 54(b) of the Federal Rules of Civil Procedure. It disposes, with finality in the district court, of the claims against the other defendants, and they should not have to wait until the case against the bus company is concluded to get a definitive determination of their liability.

The three defendants who were found liable argue mainly that the plaintiffs' suit is barred by the Eleventh Amendment and that in any event no reasonable jury could have found them guilty of inflicting cruel and unusual punishment. The plaintiffs, cross-appealing from the dismissal of the pendent claim, argue that the district judge was wrong to think it barred by the Eleventh Amendment, especially when the judge thought the Eleventh Amendment no bar to the civil rights claim. Several of the plaintiffs also challenge the jury's award of damages to them, as too low.

The defendants say they were sued in their official capacities, making this a suit against the state. If you believe that a state officer has violated your constitutional rights, you have a choice between suing the officer personally and suing the state. If you go the former route you don't have to worry about the Eleventh Amendment but do have to worry about various personal defenses, such as good-faith immunity; if you go the latter route you don't have to worry about personal defenses but may have to worry about the Eleventh Amendment. See *Kentucky v. Graham*, 105 S. Ct. 3099, 3105-06 (1985). A suit against an official in his official rather than individual capacity is a suit against the state. See *id.* at 3105; *Brandon v. Holt*, 105 S. Ct. 873, 878 (1985).

The complaint named Franzen "in his capacity as Director of the Illinois Department of Corrections," but Wolff and Hert merely as "Former Warden of the Joliet Correctional Center" and "Former Chief of Security" at Joliet, respectively, and the three guards just as "Officers of the Illinois Department of Corrections." The same designations appear in the part of the complaint that asks for damages. All this might seem to clinch the case for regarding the suit against Franzen, at least, as an official-capacity suit and hence barred by the Eleventh Amendment; for section 1983 did not abrogate the states' Eleventh Amendment immunity from damage suits, *Owen v. Lash*, 682 F.2d 648, 654 (7th Cir. 1982), and Illinois has not waived that immunity. Although the Eleventh Amend-

ment, read literally, forbids the federal courts to exercise jurisdiction over any suit by a citizen against a state, they may do so if the state consents, *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam)—a rare example of the conferral of subject-matter jurisdiction by consent.

Not only suing a defendant in his official capacity, but even just naming the defendant's office, raises a presumption that he is being sued only in his official capacity. See, e.g., *Kolar v. County of Sangamon*, 756 F.2d 564, 568-69 (7th Cir. 1985); *Wolf-Lillie v. Sonquist*, 699 F.2d 864, 869-70 and n. 12 (7th Cir. 1983). It suggests that the plaintiff is really after the employer, which is to say the state or a state agency. But the presumption cannot be conclusive in a system such as the Federal Rules of Civil Procedure create, in which the complaint does not fix the plaintiff's rights but may be amended at any time to conform to the evidence. See Fed. R. Civ. P. 15(b); *Phillips v. Vandygriff*, 711 F.2d 1217, 1225 n. 9 (5th Cir. 1983). Whatever the plaintiffs may have had in mind when they named Franzen "in his capacity as Director" of the Illinois prison system, the case was tried as a suit against the defendants as individuals. This is shown most dramatically by the fact that the judge, at the defendants' request, instructed the jury that all of the defendants were being sued as individuals, that they were liable only for their personal acts or omissions to act, and that neither the State of Illinois nor the Illinois Department of Corrections was a defendant.

The defendants do not argue that the form of the complaint misled them. Bear in mind that Franzen resigned as Director of the Illinois Department of Corrections while the suit was in progress, while Wolff and Hert had already resigned from the offices named in the complaint. If the state attorney general's office, which represents state officials whether sued in their official or individual capacities, had thought this a suit against Franzen or Wolff or Hert in their official capacities, we do not understand why it did not move in either the district court or this court to substitute their successors in office as defen-

dants in their place. See Fed. R. Civ. P. 25(d)(1); Fed. R. App. P. 43(c). We hold that substance trumps form and that all the defendants were sued in their individual capacities. That this issue may not recur we urge counsel for civil rights plaintiffs when they are suing a state officer in his individual capacity to say so plainly; and if in both his individual and official capacities to make that unmistakably clear, too. *Kolar v. County of Sangamon*, *supra*, 756 F.2d at 568-69.

But being sued in their individual capacities the defendants could be held liable only for their individual wrongdoing. Section 1983 does not recognize a doctrine of superiors' liability. *McKinnon v. City of Berwyn*, 750 F.2d 1383, 1390 (7th Cir. 1984). Such a doctrine would be analogous to respondeat superior, which makes the employer, as distinct from a superior employee, liable for an employee's tort—and which is also unavailable in suits under section 1983. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691-94 (1978). So Franzen could not be held liable for the torts of his subordinates in the Department of Corrections. As there is no evidence of Franzen's individual wrongdoing—no evidence for example that he rewrote the guards' manual to eliminate some safety precaution in the event of fire—it may seem that the suit must really be against the office, and hence the state, not against the man. But the plaintiff is the master of his complaint. If he proceeds on a theory that he cannot substantiate factually, he is barred because of his failure of proof, not because another theory which he did not pursue is barred by an immunity. The plaintiffs charged Franzen with personal wrongdoing. Having utterly failed to prove that, they cannot get a judgment against him, but this conclusion has nothing to do with the Eleventh Amendment and does not resolve the liability of the other defendants.

An Illinois statute entitles state employees to be indemnified by the state for damages imposed on them for acts committed in the course of their state employment, unless the employee acted willfully or wantonly. Ill. Rev. Stat.

ch. 127, ¶ 1302 (d). The defendants argue that the statute makes this a suit against the state, because the state will end up footing the bill for any damage judgment against them. Yet every court that has considered this issue has rejected, rightly in our view, the argument that an indemnity statute brings the Eleventh Amendment into play. See, e.g., *Wilson v. Beebe*, 770 F.2d 578, 588 (6th Cir. 1985); *Demery v. Kupperman*, 735 F.2d 1139, 1146-49 (9th Cir. 1984); *Downing v. Williams*, 624 F.2d 612, 626 (5th Cir. 1980), vacated on other grounds, 645 F.2d 1226 (1981) (per curiam).

Forget about the fact that the statute does not require the state to indemnify for punitive damages (because awarded only for conduct that is willful or wanton, or much worse); for as a matter of fact the State of Illinois usually indemnifies its employees for such damages and we assume would do so here. Nevertheless the purpose of the Eleventh Amendment is only to protect the state against involuntary liability. If the state chooses to pick up the tab for its errant officers, its liability for their torts is voluntary. It is true that the burden of tort judgments against state employees may eventually come to rest on the state with or without indemnity. If the state doesn't indemnify its officers it may have to pay them higher salaries so that they can buy insurance that will do so. But this type of argument has never succeeded in getting the bar of the Eleventh Amendment extended to suits against state officers in their individual capacities, and anyway is unrelated to the indemnity statute. Moreover, it would be absurd if all a state had to do to put its employees beyond the reach of section 1983 and thereby make the statute ineffectual except against employees of local governments (local government is not protected by the Eleventh Amendment) was to promise to indemnify state employees for any damages awarded in such a suit.

The defendants' last argument under the Eleventh Amendment is that since state law requires the state to pay, and it has paid, the plaintiffs' medical expenses, this suit insofar as it seeks the recovery of such expenses as

an item of damages is really against the state. The opposite would be more nearly correct, once it is established that this is a suit against the defendants in their individual rather than official capacities. Insofar as the state has paid medical expenses incurred as a result of the defendants' wrongful acts, the state would have (but for the indemnity statute) a claim against the defendants to reimburse it. Its position would be akin to that of a coplaintiff, subrogated to so much of the plaintiffs' claim as seeks reimbursement for medical expenses that the state rather than the plaintiffs has actually borne.

The defendants' alternative argument against liability is that, even viewing the evidence in the light most favorable to the plaintiffs, as of course we must do in appraising the argument, what they did could not reasonably be thought a violation of the Eighth Amendment. Negligence, perhaps; gross negligence—giving due regard for the jury's verdict—perhaps; but not cruel and unusual punishment. This is clear enough with regard to Franzen. Not having been personally involved in the security and safety measures regarding the bus, he is guilty at worst of neglect. But the other two appellants were personally and responsibly involved in securing the bus and in taking or failing to take measures to assure the safety of the prisoners transported on the bus. Their role is analogous to that of the police chief in *McKinnon v. City of Berwyn*, *supra*, 750 F.2d at 1391, who, having participated in conduct of his subordinates that led to the plaintiff's false arrest and brutal treatment, could be jointly liable with them for violating the plaintiff's civil rights. Still we must decide whether what Wolff and Hert did or failed to do amounted to the infliction of a cruel and unusual punishment.

The constitutional prohibition of "cruel and unusual punishments" apparently was intended, as the words suggest, merely to prohibit barbarous punishments—punishments having the character of torture, see Granucci, "*Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 Calif. L. Rev. 839, 840-42 (1969)—although the Supreme Court has interpreted the historical record

somewhat more broadly, see, e.g., *Ingraham v. Wright*, 430 U.S. 651, 664-67 (1977). And originally, of course, the prohibition was only against the federal government's inflicting such punishments, the Bill of Rights not being applicable to the states. But the Supreme Court has decided that freedom from cruel and unusual punishments is one of the liberties secured against state action by the due process clause of the Fourteenth Amendment, and like freedom of speech one of those liberties a state cannot deprive a person of even if does so by impeccable procedures. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962); *Estelle v. Gamble*, 429 U.S. 97 (1976).

Even so, the plaintiffs could get nowhere if the words "unusual" and "punishment" were given anything like their normal meanings. The infliction of punishment is a deliberate act intended to chastise or deter. This is what the word means today; it is what it meant in the eighteenth century; Samuel Johnson's *Dictionary of the English Language* (1755) defines "punishment" as "Any infliction or pain imposed in vengeance of a crime." If a guard decided to supplement a prisoner's official punishment by beating him, this would be punishment, and "cruel and unusual" because the Supreme Court has interpreted the term to forbid unauthorized and disproportionate, as well as barbarous, punishments. See *Ingraham v. Wright*, *supra*, 430 U.S. at 664-67, summarizing the case law. But if the guard accidentally stepped on the prisoner's toe and broke it, this would not be punishment in anything remotely like the accepted meaning of the word, whether we consult the usage of 1791, or 1868, or 1985. Again, if a prisoner has a serious illness and the prison staff, though fully aware of the gravity of the illness, refuses to treat it and the prisoner dies, this could well be deemed, and under current case law would be deemed, the infliction of punishment. See, e.g., *Joseph v. Brierton*, 739 F.2d 1244, 1246 (7th Cir. 1984). But if the staff merely misdiagnoses the illness and thinking it trivial does not treat it, and the prisoner dies, this would not be punishment in any accepted meaning of the word even if the diagnosis

was negligent. See, e.g., *Benson v. Cady*, 761 F.2d 335, 341 (7th Cir. 1985) (dictum).

These are the easy cases; the hard ones are where the behavior of the prison's staff is somewhere in between careless and deliberate infliction of suffering; and we must consider where the line is drawn. The reigning formula of course is "deliberate indifference," e.g., *Jones v. Morris*, No. 84-2639, slip op. at 5 (7th Cir. Nov. 27, 1985), but the term is not self-defining. Indeed, like other famous oxymorons in law—"deliberate speed" for example or "substantive due process"—it evades rather than expresses precise meaning.

The usual intermediate category in law between negligence and deliberateness is recklessness; and reflection on the commonest legal meanings of "reckless" may point us to a solution of our conundrum. One usage, common in tort law, essentially equates recklessness to gross negligence. See Prosser and Keeton on the Law of Torts 214 (5th ed. 1984). If negligence under Judge Learned Hand's formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), and in later cases such as *United States Fidelity & Guaranty Co. v. Jadranska Slobodna Plovidba*, 683 F.2d 1022, 1026 (7th Cir. 1982), means that the cost of averting an accident is less, even if just a hair's breadth less, than the expected cost of the accident that would be averted, recklessness in the sense of gross negligence means that the disparity between the cost of prevention and the expected accident cost is great. A quite different sense of recklessness, familiar from criminal law, is the sense in which for example a wrongful, deliberate, and very dangerous act which results in death though death was not intended may be downgraded to second-degree murder, with first-degree murder being reserved for deliberate homicide. A classic example is where the defendant chokes his victim, intending to injure him seriously but not to kill him, but death results. See *Commonwealth v. Marshall*, 287 Pa. 512, 135 Atl. 301 (1926); LaFave & Scott, Handbook on Criminal Law 568 (1972). The defendant has deliberately committed an act

that is at once socially costless to avoid (by not choking his victim in the first place) and highly dangerous. So he is severely punished, for an act that was deliberate and wrongful as well as for a consequence that was lethal though unintended. As this example suggests, recklessness in criminal law implies an act so dangerous that the defendant's knowledge of the risk can be inferred. See Perkins & Boyce, Criminal Law 849-51 (3d ed. 1982).

If the word "punishment" in cases of prisoner mistreatment is to retain a link with normal usage, the infliction of suffering on prisoners can be found to violate the Eighth Amendment only if that infliction is either deliberate, or reckless in the criminal law sense. Gross negligence is not enough. Unlike criminal recklessness it does not import danger so great that knowledge of the danger can be inferred; and we remind that the "indifference" to the prisoner's welfare must be "deliberate," e.g., *Estelle v. Gamble, supra,* 429 U.S. at 104; *Jones v. Morris, supra,* slip op. at 5-6, implying such knowledge. Although some cases contain language more suggestive of the tort definition of recklessness than of the criminal law definition, see, e.g., *Benson v. Cady, supra,* 761 F.2d at 339-40; *Estate of Davis v. Johnson,* 745 F.2d 1066, 1071 (7th Cir. 1984); *State Bank v. Camic,* 712 F.2d 1140, 1146 (7th Cir. 1983), they are cases where the prisoner had failed to prove recklessness even in the tort sense, and it was not important therefore whether he would have had to prove even more in order to win the case.

The cases where a prisoner complaining of mistreatment has been allowed to recover damages under the Eighth Amendment in fact involve recklessness in the strong sense. For example, if a prisoner tells the prison doctor that he is allergic to penicillin, but the doctor injects him with penicillin anyway and the prisoner has a severe reaction, the doctor is guilty of having inflicted a cruel and unusual punishment; that was our case of *Thomas v. Pate,* 493 F.2d 151, 158 (7th Cir.), vacated and remanded on other grounds under the name of *Cannon v. Thomas,* 419 U.S. 813 (1974) (per curiam). But if before injecting him

the doctor merely fails to tell the prisoner what is in the syringe, and thus gives the prisoner no chance to alert him to a possible (and quite common) allergy, the doctor is not guilty of violating the Eighth Amendment even if it is a palpable act of medical malpractice to inject someone with penicillin without first asking him whether he is allergic. Cf. *Estelle v. Gamble*, *supra*, 429 U.S. at 107. In the first case the doctor knows there is a great danger, could avert it at trivial cost (though greater than in the case of reckless murder that we gave earlier), but instead ignores it. In the second case the doctor should know there is some danger, but he is inadvertent. Although it is conceivable if improbable that his inadvertence would be deemed unreasonable enough—given the trivial burden of inquiry—to make his conduct reckless in a tort sense, punishment cannot be inadvertent. Punishment implies at a minimum actual knowledge of impending harm easily preventable, so that a conscious, culpable refusal to prevent the harm can be inferred from the defendant's failure to prevent it. Such facts "as a history of accidents or a previous request for repairs that had fallen on deaf ears" are therefore important. *Jones v. Morris*, *supra*, slip op. at 5 n. 5.

In the present case, even if the defendants' conduct was negligent or even grossly negligent, a reasonable and properly instructed jury could not have found it sufficiently reckless to be called punishment. To begin with, the danger of a serious accident, though plain enough in retrospect, was not believed to be great and was not objectively so great that Wolff's and Hert's actual knowledge of the danger can be inferred. There had never been a fire on a prison bus in Illinois. This bus had been in service without incident for more than a year before the fire. The plaintiffs' able counsel presented no evidence of even a single instance in the history of this country (or for that matter any other country) of a fire on a prison bus or other vehicle in which someone was being transported under restraint. Obviously there have been such fires but they must be exceedingly rare.

Maybe no other bus has ever been so hard to get out of in an emergency as this one, but that is unlikely too. The security modifications that resulted in the sealing of the windows, roof hatch, and exits were copied from the buses that the Immigration and Naturalization Service uses to transport illegal aliens under arrest. Apparently none of those buses has ever been involved in an accident in which a prisoner was hurt because he had difficulty getting out of the bus. *McKinnon*, cited earlier, is illustrative of a number of cases where a prisoner was hurt by being banged against the inside walls of a speeding paddy wagon, see 750 F.2d at 1386, but that is an entirely different problem. The plaintiffs point out that the bus involved in the present case made long trips, while INS buses (maybe) operate mostly within cities, but we cannot see what difference that would make. It is the length of time a bus is in use rather than the length of the particular journey that counts in deciding whether the experience of the bus is comparable to that of some other bus, and there is no evidence that the INS uses its buses less than the Illinois prison authorities use theirs.

Although a manual prepared after the security modifications were made alludes to the possibility of fire, states truistically that "a fire which cannot be extinguished immediately should result in the orderly removal of residents [prisoners] from the bus," and adds somewhat ominously, "Under no circumstances should the restraining devices be removed unless a resident's life is in immediate danger," the defendants' foresight should not be the lever that raises their conduct from negligent to reckless. They realized that there could be a fire on the bus but given the absence of any known history of fires they naturally did not rate the danger high and therefore did not give much thought to the problems that might arise if there were a fire; other problems of prison administration must have seemed much more pressing. In particular they failed to realize that a large group of prisoners who were chained together might have difficulty getting out of the bus. While the chain itself was not fastened to the bus, if one

prisoner tripped on his way out—a likely occurrence in conditions of panic, fear, and in this case darkness caused by smoke (but the density of the smoke was hardly foreseeable)—the rest of the group would be stuck; and there were two groups. All this is clear in hindsight. But it was not foreseen. People often fail to foresee disasters of a kind that have not yet occurred and to take effective precautions against them, and ordinarily such lack of foresight is at worst negligence; it certainly is not recklessness in anything like the criminal law sense of the word.

Davis v. United States, 716 F.2d 418 (7th Cir. 1983), a case under the Federal Tort Claims Act, provides an instructive contrast. The plaintiff broke his neck when he dove into a lake in a federal wildlife refuge. The bottom of the lake had dangerous rock outcroppings near the shore. The government had failed to take effective steps to warn the public of the danger even though there had been five similar diving accidents in another and similar lake in the same wildlife refuge in the recent past. We held that the government's failure to warn had been willful and wanton (=grossly negligent) but not willful and malicious. Yet it was a stronger case for the plaintiff than the present case. Here no history of accidents conveyed an unmistakable warning that the expected accident cost if no further precautions were taken was very high. And while the plaintiffs argue that the statement in the manual about "immediate" danger to life being the only warrant for removing handcuffs puts too much emphasis on security relative to safety and thereby evinces a conscious indifference toward prisoners' lives, they are putting too much emphasis on one word; the passage as a whole suggests a concern for, rather than callousness toward, prisoners' safety.

Not only was the perceived danger not great but the means of averting it were not simple, obvious, or cheap. Six years after the accident it is still not clear what the defendants should have done if they had thought more carefully about the danger that materialized. They could have forgone the security modifications. But the modifica-

tions were in response to a long history of escapes from Illinois prison buses. Thirty-five felons are a dangerous concentration. They cannot be transported with safety to themselves, the community, the driver, or the guards unless they are manacled and the exits sealed. The modifications were reasonable. The question was what to do, given them, to minimize the danger that the prisoners might be trapped in an accident or a fire.

This is a difficult question, reminding us that "the problems that arise in the day-to-day operation of a corrections facility are not susceptible of easy solutions. Prison administrators therefore should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security." *Bell v. Wolfish*, 441 U.S. 520, 547 (1979). The plaintiffs tell us that after the accident the prison authorities put little plaques on the backs of the seats in the bus, telling the prisoners not to panic in the event of an accident or fire; this seems to us a meager palliative, unlikely to have had the slightest effect on what occurred on the day of the fire. The plaintiffs suggest that maybe a device could have been rigged by which the driver or a guard could push a button and release the chain and perhaps the sealed exits and windows. But the record contains no evidence concerning the feasibility, expense, or dangers of such a system (the danger, for example, that a prisoner would reach the button).

Maybe the prisoners shouldn't have been chained to one another. Maybe fewer prisoners should have been transported at one time. The plaintiffs do not press these points on us. Their principal suggestion is—fire drills. This we find impossible to visualize. The bus starts in Joliet and meanders about the state, dropping off prisoners at the various prisons to which they have been assigned after being processed at the intake center at Joliet and picking up prisoners who are being transferred to other prisons. The logic of the plaintiffs' argument is that every time the bus picked up a new passenger there would have to

be a new fire drill. Guards would have to surround the bus to make sure the prisoners didn't use the occasion of the fire drill to run away. Maybe, despite these objections, prison bus fire drills are a good idea but they are not so simple and obvious a one that the failure to have conducted them—before there had been an accident—convicts the defendants of a deliberate indifference to the safety of their charges. The record contains no evidence about precautions used by other prison systems. It is of course possible that the fault here lay not with the officials responsible for the security and safety arrangements of the bus but with the guards who reacted slowly to the fire and failed to release the chains that bound the prisoners in clumsy groups—not to mention the guard who forced one prisoner back into the bus. But the jury exonerated the guards and the plaintiffs have not appealed from that part of the judgment.

We know the cases in which prison officials have been ordered to take steps to remove fire hazards, and we acknowledge that in some of them little attention was paid to the question whether the hazards were so great as to amount to cruel and unusual punishment. See, e.g., *Hoptowit v. Spellman*, 753 F.2d 779, 783-84 (9th Cir. 1985); *Santana v. Collazo*, 714 F.2d 1172, 1183 (1st Cir. 1983); *Leeds v. Watson*, 630 F.2d 674, 675-76 (9th Cir. 1980); *Battle v. Anderson*, 564 F.2d 388, 395 (10th Cir. 1977). In others, however, this essential requirement for liability was properly stressed. See, e.g., *Shrader v. White*, 761 F.2d 975, 984-86 (4th Cir. 1985); *Ruiz v. Estelle*, 679 F.2d 1115, 1152-53 (5th Cir. 1982), modified, 688 F.2d 266, 267 (1982) (per curiam). The latter decisions (amongst which we include our recent decision in *French v. Owens*, No. 83-2280, slip op. at 15 (7th Cir. Nov. 26, 1985), where we said, "The eighth amendment does not constitutionalize the Indiana Fire Code") we consider better reasoned. But in any event the cases that involve equitable remedies against fire hazards in prisons are distinguishable from this case. Prison fires, as distinct from prison *bus* fires, are common and both their hazards and the necessary precautions

well known. A judgment of reckless disregard for prisoners' safety is therefore easier to make. And there is a difference between a suit to remove a fire hazard and a suit for damages after a fire has occurred. In the former case the filing of the suit puts the prison officials on notice of a potential hazard; and if the hazard is demonstrated, yet they refuse to do anything, maybe that is evidence of a reckless disregard for safety.

The district judge should have granted judgment for the defendants notwithstanding the jury's verdict; obviously the cross-appeal by the individual plaintiffs who complain that the damages the jury awarded were inadequate must be dismissed. The defendants' complaints about the jury instructions and evidentiary rulings are moot.

That leaves only the question whether the judge was right to dismiss the pendent claim. He thought it barred by the Eleventh Amendment. But if, as he and we believe, the civil rights claim was brought against the defendants in their individual capacities, we can think of no reason for believing that the pendent negligence claim was brought against them in their official capacities; nor do the defendants suggest any reason. The judge hinted that he might have dismissed the pendent claim anyway because the jury might be confused if it had to consider the defendants' liability under both the Eighth Amendment and the common law of negligence. But we do not understand this either. The plaintiff in a personal injury case will often allege different levels of culpability, ranging upward from negligence, in the hope of getting punitive as well as compensatory damages or of defeating defenses such as comparative or contributory negligence that are effective only against the lesser forms of culpability. This has never been thought a source of serious confusion. The almost complete factual overlap between the main and pendent claims in the present case makes this a natural case for the retention rather than relinquishment of pendent jurisdiction; and while the district judge has a broad discretion in making what amounts to a managerial judgment on whether to allow a plaintiff to bring one case

in federal court or force him to litigate his state claim in state court, we cannot uphold an exercise of discretion so flawed as the one before us.

But what to do about this is another question. Since we are ordering the federal claim dismissed, since pendent party jurisdiction cannot be used to reattach the pendent negligence claim to the plaintiffs' diversity claim against the bus company, *Hixon v. Sherwin-Williams Co.*, 671 F.2d 1005, 1007-09 (7th Cir. 1982), and since pendent claim jurisdiction should normally be relinquished when the federal claim is dismissed before trial, see *United Mine Workers v. Gibbs*, 383 U.S. 715, 726 (1966), it would seem that a remand to the district court to reconsider his ruling on pendent jurisdiction could have but one result: the dismissal of the pendent claim.

But two considerations argue against this result. The first, and lesser, is that where there has been a trial, considerations of judicial economy may support retention of the pendent claim for any further trial proceedings, as we said in *Cenco Inc. v. Seidman & Seidman*, 686 F.2d 449, 458-59 (7th Cir. 1982). But that was a case where the pendent as well as main claims had been tried once, and the question was whether the retrial was to be in federal or state court; even then we noted reasons for relinquishing pendent jurisdiction—which the district judge in fact did on remand. See *In re Cenco Inc. Securities Litigation*, 601 F. Supp. 336, 342-44 (N.D. Ill. 1984).

Second, and more important, the statute of limitations has run on the pendent claim. This is a conventional reason against relinquishing pendent jurisdiction after dismissal of the main claim. See, e.g., *O'Brien v. Continental Illinois Nat'l Bank & Trust Co.*, 593 F.2d 54, 65 (7th Cir. 1979); *Joiner v. Diamond M Drilling Co.*, 677 F.2d 1035, 1043 (5th Cir. 1982). Ordinarily, however, it is not a reason in the federal courts of Illinois. An Illinois statute provides that a case dismissed by a federal court on jurisdictional grounds—and a relinquishment of pendent jurisdiction is jurisdictional—can be refiled within a year

in state court, and in the interim the statute of limitations will stop running. Ill. Rev. Stat. ch. 110, ¶ 13-217; see *Bernstein v. Lind-Waldock & Co.*, 738 F.2d 179, 188 (7th Cir. 1984). But this particular provision became effective in 1980, after this suit was brought. We know the provision would not be applied retroactively to revive a time-barred cause of action, see *Conner v. Copley Press, Inc.*, 99 Ill. 2d 382, 388, 459 N.E.2d 955, 957 (1984), but the plaintiffs' suit was not time-barred when the provision was enacted. Even if the new provision is applicable, however, another obstacle looms: the one-year period in an earlier but materially identical statute was held to begin running when the case was dismissed rather than when the dismissal was affirmed. See *Hupp v. Gray*, 73 Ill. 2d 78, 382 N.E.2d 1211 (1978). If this ruling applies to the current statute, as well it may, the period for filing suit in state court has long since run out.

Given these uncertainties, on remand the district judge should not dismiss the pendent claim unless the defendants agree to waive their statute of limitations defense in state court. See *Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768, 778 (D.C. Cir. 1982). This point is applicable, by the way, to all the defendants, not just the three who are the appellants. With regard to retention of a pendent claim in order to prevent the bar of the statute of limitations from falling, it does not matter when the main claim is dismissed; it certainly does not matter whether it is after trial (as in the case of the three guards) or after appeal (as in the case of the three officials who are the appellants).

We reverse the district judge's judgment for plaintiffs with directions to dismiss the federal claims with prejudice, but we also reverse the judgment insofar as it dismissed the pendent claim. The plaintiffs have lost their constitutional tort suit against the six defendants involved in this appeal but their common law tort suit against them remains alive. The case is remanded for further pro-

ceedings consistent with this opinion; no costs in this court.

REVERSED AND REMANDED.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

February 5, 1986

Before

Hon. WILLIAM J. BAUER, Circuit Judge
Hon. RICHARD A. POSNER, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge

Nos. 85-1010, 85-1053, 85-1084, 85-1095

JUNIOR RAY DUCKWORTH, et al.,

Plaintiffs-Appellees, Cross-Appellants,

v.

GAYLE FRANZEN, et al.,

Defendants-Appellants, Cross-Appellees.

Appeals from the United States District Court
for the Southern District of Illinois, Alton Division.
No. 80 C 5057—**William L. Beatty**, *Judge.*

ORDER

On January 2, 1986, both plaintiffs-appellees and defendants-appellants filed petitions for rehearing with suggestion for rehearing *en banc*. All of the judges on the original panel have voted to deny the petitions, and none of the active members of the court has requested a vote on the suggestion for rehearing *en banc*. The petitions are therefore DENIED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS
ALTON DIVISION

No. 80-5057
(Consolidated)

JUNIOR RAY DUCKWORTH, et al.,

Plaintiffs,

vs.

GAYLE FRANZEN, et al.,

Defendants.

FINDING AND ORDER PURSUANT TO RULE 54(b)

On October 22, 1984, judgments were entered on the jury verdicts in these consolidated cases in favor of the civil rights plaintiffs[1] and against the civil rights defendants, GAYLE M. FRANZEN, DENNIS J. WOLFF and RICHARD R. HERT. Judgments were also entered on that date on the jury verdicts in favor of the civil rights defendants, William M. Hargrove, James A. Krug, and John B. Tipton, and against the civil rights plaintiffs. All post-trial motions directed against those judgments were denied on December 18, 1984.

Further, prior to the trial of this cause, on April 18, 1984, this Court, by written order, granted the motion of all civil rights defendants to dismiss all pendent state

law claims of the civil rights plaintiffs directed against them, charging common law negligence or willful and wanton misconduct.

Pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, this Court expressly finds that there is no just reason for delay in the appeal of the judgments entered herein on October 22, 1984, or the order of April 18, 1984, dismissing the pendent state law claims.

It is so ordered, this 1st day of February, 1985.

ENTER: /s/ WILLIAM L. BEATTY
United States District Judge

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[1] Junior Ray Duckworth, William Woodward, Michael Mullins, Daniel Hines, Freddie Brown, Emmett Leatherwood, Rudolf Moffet, Robert Osborne, Ben Cantrell, James Long, James Tirrell, Theodore Tirrell, Sherman Tirrell, Charles Campbell, Dresden Faulkner, Dennis Walker, Michael Rucker, Ward Quaco, Stanley Lathrop, Robert Foster and LaMarr Hurrins.

PREPARED BY:

REX L. REU
RENO, O'BYRNE & KEPLEY, P.C.
501 West Church Street
P.O. Box 693
Champaign, IL 61820
217/352-7661

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF ILLINOIS

No. 80 5057

ILLINOIS DEPARTMENT OF CORRECTIONS, Et al.,

Plaintiffs,

-vs-

PREVOST CAR, INC., Et al.,

Defendants.

ORDER

The civil rights defendants, in the actions arising from a fire on a bus belonging to the Illinois Department of Corrections (IDOC), have filed a motion to dismiss the state law claims which were filed with the Section 1983 complaint and which seek recovery on the basis of negligence and wilful and wanton misconduct. The complaint named individual correctional officers as defendants, rather than naming IDOC.

Defendants urge several grounds for dismissal, among them that the Eleventh Amendment bars this court from exercising jurisdiction over the pendent state claims. In support of this position, the civil rights defendants cite *Pennhurst State School and Hospital v. Halderman*, ___ U.S. ___ (52 U.S.L.W. 4155 January 23, 1984). In pertinent part, the *Pennhurst* decision holds that the principles of sovereign immunity set forth in the Eleventh Amend-

ment is a constitutional limitation upon such exercises of judicial power as that which set forth the doctrine of pendent jurisdiction in *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966). Whenever the state is the real, substantial party in interest for purposes of any type of requested relief, whether legal or equitable, such claims which rest upon state law are barred to a federal court's review. *Pennhurst, Id.*

In *Adden v. Middlebrooks*, 688 F.2d 1147 (Seventh Circuit, 1982), the court discussed extensively the relevant factors in determining whether the state was a real party in interest in an action against the superintendent and director of the department of corrections in Louisiana. In *Adden* the court concluded that the department of corrections was the real party in interest even though only the individuals were named defendants. We believe those same factors exist in Illinois and must be considered by this court in its determination of whether the state is the real party in interest in these state actions. We need not repeat the analysis of the Seventh Circuit in its ruling that the state was the real party in interest. In addition to the same factors considered by the *Adden* court, we believe that the Illinois statute, Ch. 127 P. 63b4 which provides broad coverage to Illinois officials under the indemnification and representation provisions, adds additional weight in favor of a finding that the state is the real party in interest in these pendent state law claims. In *Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F.2d 323 (7th Cir. 1977), the court stated that if any judgment against the individuals or the agency would have to be paid out of the state treasury, then the state is the real party in interest. In the instant case the indemnification statute would necessarily operate to pay any judgment against the named individuals out of the state treasury. Therefore, we believe that the state is the real substantial party in interest as to the these (sic) pendent state law claims. The holding of *Pennhurst* thus requires that the pendent state law claims be dismissed as barred by the Eleventh Amendment.

Accordingly, the motion of the civil rights defendants to dismiss the pendent state law claims must be and the same hereby is granted and the complaint charging common law negligence and wilful and wanton misconduct are ordered dismissed.

IT IS SO ORDERED.

DATED: This 18th day of April, 1984.

/s/ WILLIAM L. BEATTY
United States District Judge

NOTE: CLERK TO SEND COPIES TO ALL PARTIES.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

No. 80-5057
(80-5138)

EMMETT LEATHERWOOD and RUDOLPH MOFFETT,

Plaintiffs,

vs.

GAYLE M. FRANZEN, in his capacity as Director of the Illinois Department of Corrections; DENNIS J. WOLFF, Former Warden of the Joliet Correctional Center; RICHARD R. HERT, Former Chief of Security of the Joliet Correctional Center; WILLIAM M. HARTGROVE, JAMES A. KRUG, and JOHN B. TIPTON, Officers of the Illinois Department of Corrections; and PREVOST CAR, INC., a foreign corporation,

Defendants.

AMENDED COMPLAINT

COUNT I

NOW COME the Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, by their *attorney, W. Loren Thomson of Thomson, Weintraub & Thompson,* and complaining of the Defendant, PREVOST CAR, INC., state as follows:

1. That Count I is an action for personal injuries brought by the Plaintiff inmates of the Illinois Department of Corrections for injuries incurred when the bus in which they were riding caught fire, while the Plaintiffs were locked aboard the bus with no means to evacuate therefrom.

2. That jurisdiction for Count I is established by virtue of complete diversity of citizenship, pursuant to 28 U.S.C. Section 1332. All Plaintiffs are residents of the State of Illinois, and the Defendant is a foreign corporation not authorized to do business in Illinois. The amount in controversy, exclusive of costs, is in excess of $10,000 for each Plaintiff. Venue is properly laid in the United States District Court for the Southern District of Illinois pursuant to 28 U.S.C. Section 1391.

3. That on or prior to the 29th day of November, 1979, the Defendant, PREVOST CAR, INC., designed, manufactured, and/or sold a certain bus known as model #TS 47, Serial #C 102 252 178, which it placed in the stream of commerce and sold to the Illinois Department of Corrections, a governmental agency of the State of Illinois Executive Department.

4. That on the 29th day of November, 1979, while the bus was being used to transport the Plaintiffs, a fire started in the bus with release of resultant toxic fumes.

5. That at the time the bus, model #TS 47, Serial #C 102 252 178, left the control of the Defendant, PREVOST CAR, INC., said bus was unreasonably dangerous in one or more of the following respects:

(a) Was designed, manufactured and sold in a condition such that the users thereof were likely to be injured when the bus was used in a manner that was reasonably foreseeable;

(b) Was designed, manufactured and sold with a threaded, refrigerant unit connection placed in the proximity of electric wires in the stowage evaporation compartment;

(c) Was designed, manufactured and sold with the flare holder located in the proximity of the refrigerant line.

6. That as a direct and proximate result of one or more of the foregoing unsafe conditions of said bus, the Plaintiffs were then and there injured and suffered damage, and with reasonable certainty will continue to suffer.

WHEREFORE, the Plaintiffs demand trial by jury and pray for judgment against the Defendant, PREVOST CAR, INC., in *the amount of One Hundred Fifty Thousand Dollars ($150,000.00) for each Plaintiff and his costs of suit and any other relief to which he is entitled.*

COUNT II

NOW COME the Plaintiffs, by their *attorney, W. Loren Thomson of Thomson, Weintraub, & Thompson,* and complaining of the Defendant, PREVOST CAR, INC., state as follows:

1. That Count II is an action for personal injuries brought by the Plaintiff inmates of the Illinois Department of Corrections for injuries incurred when the bus in which they were riding caught fire, while the Plaintiffs were locked aboard the bus with no means to evacuate therefrom.

2. That jurisdiction for Count II is established by virtue of complete diversity of citizenship, pursuant to 28 U.S.C. Section 1332. All Plaintiffs are residents of the State of Illinois, and the Defendant is a foreign corporation not authorized to do business in Illinois. The amount in controversy exclusive of costs, is in excess of $10,000 for each Plaintiff. Venue is properly laid in the United States District Court for the Southern District of Illinois pursuant to 28 U.S.C. Section 1391.

3. That on or prior to the 29th day of November, 1979, the Defendant, PREVOST CAR, INC., designed, manufactured, and/or sold a certain bus known as model #TS 47, Serial #C 102 252 178, which it placed in the stream of

commerce and sold to the Illinois Department of Corrections, a governmental agency of the State of Illinois Executive Department.

4. That on the 29th day of November, 1979, while the bus was being used to transport the Plaintiffs, a fire started in the bus with release of resultant toxic fumes.

5. That at all times hereinmentioned, the Plaintiffs were in the exercise of ordinary care for their own safety.

6. That at the time the bus, model #TS 47, Serial #C 102 252 178, left the control of the Defendant, PREVOST CAR, INC., was guilty of one or more of the following wrongful acts or omissions:

(a) Carelessly and negligently designed, manufactured and sold the bus in a condition such that users thereof were likely to be injured when the bus was used, although the Defendant knew or should have known of the danger of such injury;

(b) Carelessly and negligently designed, manufactured, and sold the bus with a threaded refrigerant unit connection placed in the proximity of electric wire in the stowage evaporation compartment;

(c) Carelessly and negligently designed, manufactured, and sold the bus with the flare holder located in the proximity of the refrigerant line.

7. That as a direct and proximate result of one or more of the foregoing wrongful acts or omissions, the Plaintiffs were then and there injured and suffered damage, and with reasonable certainty will continue to suffer.

WHEREFORE, the Plaintiffs demand a trial by jury and pray for judgment against the Defendant, PREVOST CAR, INC., in the *amount of One Hundred Fifty Thousand Dollars ($150,000.00) for each Plaintiff and his costs of suit and any other relief to which he is entitled.*

COUNT III

NOW COME the Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, by and through their *attorney, W. Loren Thomson,* of *Thomson, Weintraub, & Thompson,* seeking declaratory and injunctive relief and money damages against the Defendants, GAYLE M. FRANZEN, in his capacity as Director of the Illinois Department of Corrections; *DENNIS J. WOLFF, Former Warden of the Joliet Correctional Center, RICHARD R. HERT, Former Chief of Security of the Joliet Correctional Center; and WILLIAM M. HARTGROVE, JAMES A. KRUG, and JOHN B. TIPTON, Officers of the Illinois Department of Corrections,* and state as follows:

1. The Plaintiffs are citizens of the United States and the State of Illinois, and are "committed persons" as defined in Section 1003-1-2 of the Illinois Unified Code of Corrections, Ill. Rev. Stat. 1979, ch. 38, Section 1003-1-2, in that each of them has been judicially placed in the custody of the Illinois Department of Corrections on the basis of a conviction for a crime; further, both plaintiffs *are presently* incarcerated at the Menard Correctional Center near Chester, Randolph County, Illinois.

2. That Defendant, GAYLE M. FRANZEN, (hereinafter "FRANZEN"), a resident of Springfield, Sangamon County, Illinois, has been, at all times relevant to this *Amended* Complaint, the Director of the Illinois Department of Corrections and administers the Department pursuant to the authority conferred on him by Section 1003-2-3 of the Illinois Unified Code of Corrections, Ill. Rev. Stat. 1979, ch. 38, Section 1003-2-3; further, as such Director, he exercises general supervision and direction over the promulgation and enforcement of all rules and regulations established by the Illinois Department of Corrections for the protection of the persons and property of individuals committed to the Department's custody, pursuant to Section 1003-7-4 of the aforesaid Illinois Unified Code of Corrections, Ill. Rev. Stat. 1979, ch. 38, Section 1003-7-4.

3. *The Defendant, DENNIS J. WOLFF, (hereinafter "WOLFF") a resident of Joliet, Will County, Illinois, was at all times relevant to this Amended Complaint, the Warden of the Joliet Correctional Center and participated in the drafting and promulgation of the rules and procedures for the transfer of committed persons which were in effect on November 29, 1979.*

4. *The Defendant, RICHARD R. HERT, (hereinafter "HERT"), a resident of Joliet, Will County, Illinois, was, at all times relevant to this Amended Complaint, the Chief of Security of the Joliet Correctional Center and participated in the drafting and promulgation of the rules and procedures for the transfer of committed persons which were in effect on November 29, 1979.*

5. The Defendants, *WILLIAM M. HARTGROVE, (hereinafter "HARTGROVE"), JAMES A. KRUG, (hereinafter "KRUG") and JOHN B. TIPTON, (hereinafter "TIPTON"),* are three employees and officers of the Illinois Department of Corrections who were aboard, and in direct charge of, a certain bus used to transport the Plaintiff and other committed persons from the Joliet Correctional Center at Vandalia, Illinois, on November 29, 1979.

6. This Court has jurisdiction over this claim pursuant to the provisions of Title 28 U.S.C., Sec. 1331 and 1343, because of the following:

(a) The matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and arises under the Constitution and laws of the United States including the Eighth and Fourteenth Amendments to the Constitution of the United States and Title 42 U.S.C., Sec. 1983;

(b) This is an action to redress the deprivation, under color of the laws, statutes, and regulations of the State of Illinois, of certain rights secured to the Plaintiffs by the Eighth and Fourteenth Amendments to the Constitution of the United States;

(c) This is an action to secure declaratory relief pursuant to Title 28 U.S.C., Sec. 2201 and 2202 with regard to the protection of the Plaintiffs' civil rights under Title 42 U.S.C., Section 1983;

(d) This is an action to secure equitable relief for the protection of the Plaintiffs' civil rights under Title 42 U.S.C., Sec. 1983;

(e) This is an action to recover money damages against the Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON*, to redress the deprivation, under color of the laws, statutes, and regulations of the State of Illinois, of certain rights secured to the Plaintiffs by the Eighth and Fourteenth Amendments to the Constitution of the United States, in violation of Title 42 U.S.C., Sec. 1983;

(f) This is an action in equity against the Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON*, to redress the deprivation, under color of the laws, statutes, and regulations of the State of Illinois, of certain rights secured to the Plaintiff by the Eighth and Fourteenth Amendments to the Constitution of the United States, in violation of Title 42 U.S.C., Sec. 1983;

(g) Actions and conduct by the Defendants FRANZEN, *HARTGROVE, KRUG, and TIPTON* have caused, and may cause in the future, great and irreparable injury to the rights secured to the Plaintiff under the Eighth and Fourteenth Amendments to the Constitution of the United States, and said injury cannot be vindicated in state courts.

7. In the early morning of November 29, 1979, the Plaintiff and approximately twenty other committed persons were ordered by agents of the Illinois Department of Corrections to board a certain bus at the Joliet Correctional Center for purposes of transport to the Menard Correctional Center near Chester, Randolph County, Illinois.

8. Early in the afternoon of November 29, 1979, after making stops at the Correctional Centers at Stateville and Pontiac to pick up additional committed persons for transport, the bus arrived at the Vandalia Correctional Center near Vandalia, Fayette County, Illinois.

9. At approximately 1:05 p.m., the bus filled with dense, noxious, and toxic smoke from a fire in a storage compartment on the right-hand side of the bus.

10. By virtue of the Eighth and Fourteenth Amendments to the United States Constitution, and the principles announced in ***Ferguson v. Fleck***, 480 F. Supp. 219 (W.D. Mo. 1979), and *Hamilton v. Covington*, 445 F. Supp. 195 (W.D. Ark. 1978), the Plaintiff has a right to be protected from physical harm, including fire, while incarcerated and in the custody of the Illinois Department of Corrections.

11. In the *drafting*, promulgation, and enforcement of the rules and regulations of the Illinois Department of Corrections, the Defendants FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON*, acted with deliberate indifference to the needs of the Plaintiff, in bad faith and in reckless disregard of the Plaintiff's clearly established constitutional rights.

12. As a direct result of the fire described above and the failure of the Defendants FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON*, to take adequate precautions for his safety, the Plaintiff, EMMETT LEATHERWOOD, suffered smoke inhalation and respiratory injury, and various complications arising therefrom, and other serious injuries, and he was hospitalized for a substantial period of time and will have permanent disability from the same and suffered grievous pain and anguish and will in the future.

13. As a direct result of the fire described above and the failure of the Defendants FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON*, to take adequate precautions for his safety, the Plaintiff, RUDOLPH MOPPETT, suffered smoke inhalation and respiratory injury and various

complications arising therefrom, and other serious injuries, and he was hospitalized for a substantial period of time and will have permanent disability from the same and suffered grievous pain and anguish and will in the future.

14. All of the aforesaid acts of the Defendants FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON* have been under color of the laws and statutes of the State of Illinois and the regulations of the Illinois Department of Corrections, and have been performed in their official capacities as officers and agents of the State of Illinois; further, the actions of the Defendants described above have caused irreparable injury to, and deprivation of, the civil rights of the Plaintiff under the Eighth and Fourteenth Amendments to the Constitution of the United States.

15. There is not now pending in any state court any action connected with this cause that would require federal abstention under the doctrine of *Younger v. Harris*, 401 U.S. 37 (1971), and no state court forum now exists for vindication of the Plaintiff's rights under the Constitution of the United States.

16. The rules and regulations of the Illinois Department of Corrections concerning transport of committed persons, as promulgated and approved by the Defendants *FRANZEN, WOLFF and HERT*, and as enforced against the Plaintiff by the Defendants *HARTGROVE, KRUG and TIPTON* are unlawful, invalid, and in violation of the Plaintiff's rights under the Eighth and Fourteenth Amendments to the United States to be free from cruel and unusual punishment.

17. The Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, have suffered substantial personal injury as a result of the acts and conduct of the Defendants herein, to their damage in an amount in excess of Ten Thousand Dollars ($10,000.00), for which they are entitled to compensation from the Defendants, jointly and severally.

18. In prosecuting this action to vindicate their rights under the Eighth and Fourteenth Amendments to the

United States Constitution and Title 42 U.S.C., Sec. 1983, the Plaintiffs will incur substantial attorney's fees, which they are entitled to recover from the Defendants by virtue of Title 42 U.S.C., Sec. 1988.

19. Unless preliminary and permanent injunctions are issued against the Defendant FRANZEN ordering him to cease enforcement of those rules and regulations of the Illinois Department of Corrections requiring that committed person, including the Plaintiffs, be transported under the conditions described in this Complaint, the agents of the Illinois Department of Corrections will continue the aforesaid unlawful, invalid, and unconstitutional conduct to the great, immediate, and irreparable injury of the Plaintiffs' rights under the Eighth and Fourteenth Amendments to the United States Constitution, for which the Plaintiff will have no adequate remedy at law.

20. There exists an actual and justiciable controversy between the Plaintiffs and the Defendants as to the constitutional validity of the aforesaid rules and regulations of the Illinois Department of Corrections, the validity of which this Court should adjudicate and declare in this case, pursuant to its authority under Title 28 U.S.C., Sec. 2201 and 2202.

WHEREFORE, the Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, pray for the following relief:

A. A declaration, pursuant to Title 28 U.S.C., Sec. 2201 and 2202, that the rules and regulations of the Illinois Department of Corrections regarding the transport of committed persons between correctional institutions, either as promulgated or as enforced against the Plaintiffs, as described in this *Amended* Complaint, are invalid and in violation of the Plaintiffs' rights under the Eighth and Fourteenth Amendments to the Constitution of the United States;

B. Preliminary and permanent injunctions, pursuant to Rule 65 of the Federal Rules of Civil Procedure, ordering the Defendant FRANZEN to cease enforcement against the Plaintiffs of the present rules and regulations of the

Illinois Department of Corrections concerning transport of committed persons between correctional institutions;

C. A money judgment in favor of each of the Plaintiffs against the Defendants jointly and severally for their personal injuries in the amount of One Hundred Fifty Thousand Dollars ($150,000.00) per Plaintiff;

D. Reasonable attorney's fees, pursuant to Title 42 U.S.C., Sec. 1988, to be taxed as costs to the Defendants;

E. Their costs of suit herein; and

F. Such other and further relief as this Court may deem just and proper.

COUNT IV

The Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, by and through their *attorney, W. Loren Thomson of Thomson, Weintraub, & Thompson,* seeking money damages against the Defendants, GAYLE M. FRANZEN, in his capacity as Director of the Illinois Department of Corrections; *DENNIS J. WOLFF, Former Warden of the Joliet Correctional Center; RICHARD R. HERT, Former Chief of Security of the Joliet Correctional Center; WILLIAM M. HARTGROVE, JAMES A. KRUG, and JOHN B. TIPTON, Officers of the Illinois Department of Corrections,* state as follows:

1-5. Plaintiff adopts and incorporates Paragraphs one through five of Count III of this Amended Complaint and hereby makes the same a part hereof.

6. This Court has pendent jurisdiction over this claim under the principles announced in *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), because of the following:

(a) This Court has subject matter jurisdiction over the claim and matters alleged in Count I of this Amended Complaint; and

(b) The claim contained in this Count III and the claim contained in Count I derive from common operative facts.

7. The Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON,* owed a duty to the Plaintiffs, LEATHERWOOD and MOFFETT, to exercise ordinary and reasonable care for the preservation of their health and welfare.

8. The Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON,* negligently drafted, promulgated, approved and enforced rules and procedures for the transfer of committed person which were in effect on November 29, 1979.

9. At all times relevant to this *Amended* Complaint, the Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT, exercised due care in the protection of their person and were free from any negligence which caused or contributed to the injuries sustained by them.

10. As a direct and proximate result of the negligence of the Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON,* the Plaintiff, RUDOLPH MOFFETT, suffered smoke and noxious fume inhalation, lung injury, and he was disabled and will be disabled in the future, and he was hospitalized and sought and received medical care and will in the future, and he suffered grievous pain and anguish, all to his money damage.

11. As a direct and proximate result of the negligence of the Defendants, FRANZEN, *WOLFF, HERT, HARTGROVE, KRUG, and TIPTON,* the Plaintiff, EMMETT LEATHERWOOD, suffered smoke and noxious fume inhalation, back injury, and he was disabled and will be disabled in the future, and he was hospitalized and sought and received medical care and will in the future, and he suffered grievous pain and anguish, all to his money damage.

WHEREFORE, the Plaintiffs, EMMETT LEATHERWOOD and RUDOLPH MOFFETT pray for a judgment in favor of each of them, individually, and against the Defendant, GAYLE M. FRANZEN, in his capacity as Director of the Illinois Department of Corrections; *DENNIS J. WOLFF, Former Warden of the Joliet Correctional Center; RICHARD R. HERT, Former Chief of Security of the Joliet Correc-*

tional Center; and WILLIAM M. HARTGROVE, JAMES A. KRUG, *and* JOHN B. TIPTON, *Officers of the Illinois Department of Corrections, in the sum of One Hundred Fifty Thousand Dollars ($150,000.00)* for each of them, and for their costs of suit and any other relief to which they are entitled.

EMMETT LEATHERWOOD and RUDOLPH MOFFETT,
Plaintiffs,

BY: /s/ W. LOREN THOMSON
W. Loren Thomson, Attorney for Plaintiffs

W. LOREN THOMSON
THOMSON, WEINTRAUB, & THOMPSON
Attorneys for Plaintiff
105 N. Center, P.O. Box 3577
Bloomington, IL 61701
Phone: (309) 829-7069

APPENDIX F

IN THE COURT OF CLAIMS OF THE
STATE OF ILLINOIS

Claimant No. _____

ROBERT DUANE OSBORNE,

Claimant,

vs.

STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS,

Respondent.

$6,000,000.00
Amount Claimed

COMPLAINT

Now comes the Claimant, ROBERT DUANE OSBORNE, by his Attorney, SMITH, MOOS, SCHMITT & O'BRIEN, LTD., and complaining of the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS, says:

1. That this claim sounds in tort and is brought pursuant to Section 8(d) of the Court of Claims Act. (Ill.Rev. Stat. 1979, Ch. 37, par. 439.8(d).

2. That the incident herein complained of occurred on November 29, 1979, at about 2:00 P.M. near the prison faculty operated by the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS, in Vandalia, Illinois.

3. That at said time and place the Claimant, ROBERT DUANE OSBORNE, was a prisoner of the STATE OF ILLI-

NOIS, DEPARTMENT OF CORRECTIONS, and was a passenger on a transfer bus operated by the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS.

4. That at said time and place the Claimant, ROBERT DUANE OSBORNE, was in the exercise of due care and caution for his own safety.

5. That the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS, had a duty to exercise ordinary care in the transport of the Claimant, ROBERT DUANE OSBORNE.

6. That the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS acting through its agents, servants and employees was then and there guilty of one or more of the following negligent acts or omissions:

(a) Negligently and carelessly failed to remove ROBERT DUANE OSBORNE from the transfer bus after a fire started on said bus;

(b) Negligently and carelessly failed to remove the handcuffs and shackles which secured ROBERT DUANE OSBORNE to the transfer bus, after such bus caught fire;

(c) Negligently and carelessly closed the door of the burning transfer bus preventing the exit of ROBERT DUANE OSBORNE after such bus caught fire.

7. That as a direct and proximate result of one or more of the foregoing negligent and careless acts or omissions, ROBERT DUANE OSBORNE was trapped on a burning transfer bus, thereby suffering the severe injuries hereinafter complained of.

8. That as a direct and proximate result of the foregoing incident the Plaintiff was severely and permanently injured in that he has been burned all over his body; during all of which time ROBERT DUANE OSBORNE has suffered great physical pain and mental anguish, and will, in the future, continue to suffer great physical pain, mental anguish, and distress; further, ROBERT DUANE OSBORNE, will in the future, expend and become obligated

to expend large sums of money for hospital bills, doctor bills, medication and other expenses for medical attention in and about endeavoring to be healed and cured of his said injuries; further, the said ROBERT DUANE OSBORNE; will in the future, lose great gains, wages, and profits which he otherwise would have earned or acquired had it not been for these aforesaid injuries; further ROBERT DUANE OSBORNE has, in the past, and will in the future, be hindered, hampered and prevented from carrying on his ordinary affairs and duties to the same extent and in the same manner he was able to do prior to his aforesaid injuries.

9. That this claim has not been previously presented to any State Department or Officer thereof.

10. That no person other than the Claimant is owner of this claim and that the attorneys of record herein have an interest in the claim in that they are representing the Claimant on a contingent fee basis.

11. That no assignment or transfer of this claim or any part thereof or interest therein has been made except as stated herein.

12. That the claimant is justly entitled to the amount claimed herein after allowing all just credits.

13. That the Claimant believes the facts stated in the Complaint to be true.

14. That no claim arising out of the occurrence herein complained of has been previously presented to any person, corporation, or tribunal other than the State of Illinois.

15. That the items of damage claimed are as follows:

NATURE, EXTENT, and DURATION OF THE INJURY	$1,950,000.00
DISABILITY and DISFIGUREMENT	$2,000,000.00
PAIN and SUFFERING— PAST and FUTURE	$2,000,000.00
FUTURE MEDICAL EXPENSE	$20,000.00
FUTURE LOSS OF EARNINGS	$30,000.00

16. That the names and addresses of the treating physicians and the names of hospitals and dates of hospitalization are as follows:

Dr. Glennon Paul
901 N. First
Springfield, IL
Treatment from
11/30/79 to 12/12/79

St. John's Hospital
800 E. Carpenter
Springfield, IL
Treatment from
11/29/79 to 12/12/79

Fayette County Hospital
Seventh and Taylor
Vandalia, Illinois
Hospitalization from
11/29/79 to 11/29/79

17. That attached to this Complaint marked as Exhibits A and B are copies of the notice served as required by Section 22-1 of the Court of Claims Act (Ill.Rev.Stat., Ch. 37, para. 439.22-1).

WHEREFORE, ROBERT DUANE OSBORNE, prays judgment against STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS in the amount of SIX MILLION ($6,000,000.00) DOLLARS.

ROBERT DUANE OSBORNE,

BY: /s/ LESTER B. SMITH
His Attorney

State of Illinois)
) SS
County of Randolph)

Claimant, ROBERT DUANE OSBORNE, on his oath, states the matters alleged in this Complaint are true.

SUBSCRIBED AND SWORN
To before me this 27th
day of August, 1980.

X /s/ ROBERT D. OSBORNE
ROBERT D. OSBORNE

NOTARY PUBLIC

EXHIBIT A

May 27, 1980

Mr. William J. Scott, Attorney General
500 S. Second Street
Springfield, Illinois 62706

RE: Robert Duane Osborne
-vs-
State of Illinois, Department
of Corrections
No. _____

Dear Attorney General Scott:

We enclose herewith regarding the above-captioned case, Notice Pursuant to Chapter 37 Paragraph 439.22-1 of Illinois Revised Statutes.

Very truly yours,

BY: _____

[Copy of Receipt for Certified Mail
and Return Receipt omitted in printing.]

F-6

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

No. _____

ROBERT DUANE OSBORNE,

Claimant,

vs.

STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS,

Respondent.

$6,000,000.00
amount claimed

NOTICE PURSUANT TO CHAPTER 37 PARAGRAPH 439.22-1 OF ILLINOIS REVISED STATUTES

TO: William J. Scott, Attorney General
The Clerk of the Court of Claims
Kenneth Wells, Director, Department of Corrections

ROBERT DUANE OSBORNE is about to commence an action for personal injuries against the STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS, in the COURT OF CLAIMS, and hereby gives this notice:

1.	NAME OF PERSON TO WHOM CAUSE OF ACTION HAS ACCRUED	ROBERT DUANE OSBORNE
2.	NAME AND RESIDENCE OF PERSON INJURED	ROBERT DUANE OSBORNE Box 711 Menard, Illinois 62257
3.	DATE AND APPROXIMATE HOUR OF ACCIDENT	November 29, 1979 2:00 p.m.

4.	LOCATION OF ACCIDENT	Vandalia, Illinois
5.	DESCRIPTION OF ACCIDENT	The claimant, an inmate of the State of Illinois Department of Corrections, was on a bus operated by the State of Illinois Department of Corrections. A fire started on the bus and the claimant was burned.
6.	NAME AND ADDRESS OF ATTENDING PHYSICIAN	The claimant was attended by: Fayette County Hospital and Nursing Home West Taylor Vandalia, IL 62471 and Memorial Hospital 800 N. Rutledge Springfield, Illinois and Dr. Glennon H. Paul University Medical Bldg. 901 N. First Springfield, Illinois

This notice shall also act as notice that ROBERT DUANE OSBORNE is about to commence an action against the individual employees of the State of Illinois, Department of Corrections responsible for the aforesaid incident.

ROBERT DUANE OSBORNE, Claimant,

BY: /s/ M. MICHAEL WATERS
His Attorney

LESTER BERRY SMITH, LTD.
1711 Savings Center Tower
Peoria, Illinois 61602
Telephone: (309) 674-8291

EXHIBIT B

May 27, 1980

Clerk
Court of Claims
630 S. College Street
Springfield, Illinois 62756

RE: Robert Duane Osborne
-vs-
State of Illinois, Department
of Corrections
No. _____

Dear Sir:

We enclose herewith regarding the above-captioned case, Notice Pursuant to Chapter 37 Paragraph 439.22-1 of Illinois Revised Statutes.

Very truly yours,

By: _____

[Copy of Receipt for Certified Mail
and Return Receipt omitted in printing.]

IN THE COURT OF CLAIMS OF THE STATE OF ILLINOIS

No. _____

ROBERT DUANE OSBORNE,

Claimant,

vs.

STATE OF ILLINOIS, DEPARTMENT OF CORRECTIONS,

Respondent.

$6,000,000.00
amount claimed

NOTICE PURSUANT TO CHAPTER 37 PARAGRAPH 439.22-1 OF ILLINOIS REVISED STATUTES

To: William J. Scott, Attorney General
The Clerk of the Court of Claims
Kenneth Wells, Director, Department of Corrections

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ROBERT DUANE OSBORNE, Claimant,

BY: /s/ M. MICHAEL WATERS
His Attorney

LESTER BERRY SMITH, LTD.
1711 Savings Center Tower
Peoria, Illinois 61602
Telephone: (309) 674-8291

Supreme Court, U.S.
FILED
JUL 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1806

In The

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY, P.C.
P.O. Box 693
Champaign, IL 61820

REX L. REU
LOREN THOMSON
THOMSON, WEINTRAUB & THOMPSON
P.O. Box 3577
Bloomington, IL 61702

ABRAHAM N. GOLDMAN
ABRAHAM N. GOLDMAN & ASSOC.
407 South Dearborn Street
Suite 1000
Chicago, IL 60605

JOHN L. SWARTZ
GIFFIN, WINNING, LINDNER, COHEN & BODEWES, P.C.
P.O. Box 2117
Springfield, IL 62705

JEFFREY D. FREDERICK
JOHNSON, FRANK, FREDERICK & WALSH
129 West Main
Urbana, IL 61801

COUNSEL FOR RESPONDENTS

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

16 pp

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No. 85-1806

In The

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

CONSTITUTIONAL PROVISIONS

Clause 2 of Article VI of the Constitution of the United States provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

SUMMARY OF ARGUMENT

The Petition for a Writ of Certiorari should be denied because the decision of the Seventh Circuit on the pendent claims issue is correct. The supremacy clause embodied in Article VI of the Constitution requires that a federal court's jurisdiction be governed by federal law. To rule otherwise and hold state law determinative on the Eleventh Amendment questions would shift to the states the power to fix that jurisdiction. Moreover, the availability of punitive damages is unrelated to the issue of jurisdiction. A state's substantive law of damages cannot dictate a federal court's jurisdiction. If, in fact, Illinois substantive law precludes the recovery of punitive damages, the federal court is bound to apply that rule.

Furthermore, pendent jurisdiction may be retained over the claims directed against the three guards, notwithstanding the resolution of the underlying federal claim in their favor. The doctrine of pendent jurisdiction confers power on the federal court to hear and resolve all claims in one case.

Finally, contrary to the petitioners' arguments, the Seventh Circuit's opinion does not strip a district court of its discretion to decline pendent jurisdiction. In this case, however, the federal and state claims were so interrelated that the Court of Appeals properly concluded that they should be adjudicated in one proceeding.

———o———

REASONS FOR DENYING THE WRIT

I.

THE ELEVENTH AMENDMENT DOES NOT BAR THE PENDENT CLAIMS, AS THEY ARE DIRECTED AGAINST INDIVIDUALS AND DO NOT SEEK TO IMPOSE A FINANCIAL LIABILITY ON THE STATE OF ILLINOIS.

A. Any Eleventh Amendment Limitations On A Federal Court's Pendent Jurisdiction Are Determined As Matters Of Federal Law; State Law Does Not Govern The Result.

The Seventh Circuit Court of Appeals concluded that there was no Eleventh Amendment bar because the pendent claims, like the civil rights claim, were brought against the correctional officials in their individual capacities. *Duckworth v. Franzen*, 780 F. 2d 645, 656 (7th Cir. 1985) (Petitioners' Appendix, A-16). The petitioners contend, however, that the Eleventh Amendment requires reference to state law to determine the "real party in interest." (Petition, 13-14). Based on Illinois statutes and case law, they argue that Illinois is the real party in interest, and these claims are therefore barred by the Eleventh Amendment. If this argument is accepted, the legislatures and courts of the various states would henceforth have broad power to determine a federal court's jurisdiction. The courts that have addressed this issue have uniformly rejected such arguments, and have held that the limits of federal jurisdiction are defined by federal law.

In *Thompkins v. Stuttgart School District No. 22*, 787 F. 2d 439 (8th Cir. 1986), the court of appeals reinstated a pendent state law claim that had been dismissed by the district court for lack of jurisdiction. The district court's de-

cision was based on an Arkansas statute that purportedly vested exclusive jurisdiction of such a claim in the state courts. The court of appeals held that the state legislature could not limit a federal court's jurisdiction in such a fashion:

> "The right to assert jurisdiction over state claims through the doctrine of pendent jurisdiction is a law of the United States, and, as such, under the supremacy clause of the Constitution, Article VI, this law has precedence over any contrary state law. Once a district court has determined that under the laws of the United States it may assert pendent jurisdiction, any contrary state law which would deny that jurisdiction is ineffective."

787 F.2d at 441 (footnote and citations omitted).

In *Wilson v. Beebe*, 770 F. 2d 578 (6th Cir. 1985), the Sixth Circuit, *en banc*, upheld the exercise of pendent jurisdiction over a common law negligence claim against a state police officer. The officer argued that the Michigan indemnity statute clothed him with Eleventh Amendment immunity. While the twelve members of the *en banc* court disagreed on various aspects of the majority opinion, they were unanimous in concluding that a state legislature could not "bootstrap" immunity by the passage of a statute:

> "[T]he liability which Wilson sought to impose was not one which must be paid from the State treasury. It will be paid by the State because the State has exercised its option under M.C.L.A. § 691.1408(1) and elected to indemnify Beebe. This obligation is not imposed on the State; it is an obligation voluntarily imposed. There would be no question of who would be liable for a judgment in this case except for the State's voluntary decision to indemnify Beebe; only Beebe would be liable. The State cannot create an Eleventh Amendment bar by its voluntary act when the plain-

> tiff has proceeded only against the individual wrongdoer in his individual capacity."
>
> 770 F. 2d at 588 (emphasis in original).

The Ninth and Fifth Circuits have reached similar results, as have various district courts that have passed on the question. *Demery v. Kupperman,* 735 F. 2d 1139, 1146-1149 (9th Cir. 1984), *cert. denied,* — U.S. —, 105 S. Ct. 810 (1985); *Downing v. Williams,* 624 F. 2d 612, 626 (5th Cir. 1980), *vacated on other grounds per curiam,* 645 F. 2d 1226 (5th Cir. 1981); *Barger v. State of Kansas,* 620 F. Supp. 1432, 1437-1438 (D. Kan. 1985); *Goka v. Bobbitt,* 625 F. Supp. 319, 323-324 (N.D. Ill. 1985).

The authorities cited by the petitioners do not compel a different result in this case. The suit in *Palmer v. State of Ohio,* 248 U.S. 32 (1918), was against the sovereign in both name and substance, and was properly barred under the Eleventh Amendment. In *Ford Motor Co. v. Department of Treasury of State of Indiana,* 323 U.S. 459 (1945), the Court held that Indiana's consent to jurisdiction in tax refund suits in state court did not waive its immunity in federal court. 323 U.S. at 464-466. Significantly, the Court also stated a distinction of importance to this case:

> "Where relief is sought under general law from wrongful acts of state officials, the sovereign's immunity under the Eleventh Amendment does not extend to wrongful individual action, and the citizen is allowed a remedy against the wrongdoer personally."
>
> 323 U.S. at 462 (citations omitted).

The petitioners further insist that these claims cannot be litigated in federal court because "the identical lawsuit against the same officials would not be permitted in Illinois courts of general jurisdiction." (Petition, 14). Under

this reasoning, any state can limit its employees' exposure to federal litigation by relegating certain claims to special courts, tribunals or commissions. The Seventh Circuit has previously rejected such a suggestion [*Miller-Davis Co. v. Illinois State Toll Highway Authority*, 567 F. 2d 323, 330, n. 9 (7th Cir. 1977)], and this Court should do the same.

B. As A Matter Of Federal Law, There Is No Eleventh Amendment Bar To These Claims As They Do Not Seek To Impose A Financial Liability On The State Of Illinois.

At least as far back as *Ex parte Young*, 209 U.S. 123 (1908), this Court has adhered to the principle that a state official is subject to suit in his individual capacity in federal court. More recently, Justice Rehnquist reviewed the Eleventh Amendment case law at length and articulated the test as follows:

> "Thus the rule has evolved that a suit by private parties seeking to impose a liability which *must* be paid from public funds in the state treasury is barred by the Eleventh Amendment."

Edelman v. Jordan, 415 U.S. 651, 663 (1974) (emphasis added).

In the lower courts, the petitioners relied on an Illinois statute that extends indemnity to state employees [Ill. Rev. Stat. 1985, Ch. 127, Sec. 1302(a)] as support for their claim that the state treasury would have to pay any judgment on the pendent claims. They have abandoned that argument in this Court (Petition, 15), but they do not explain how or why any judgment on the pendent claims would now be a charge against the State of Illinois. Even if the respondents prevail and recover judgments, it is clear that those judgments cannot compel payment from the

state treasury. *See Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982).

C. The Decision Of The Court Of Appeals Will Not Foster Forum Shopping, Since The Federal Court Must Apply The Substantive Law Of The State, Including Any Restrictions On Punitive Damages.

The petitioners and the *amici* argue at length that the decision of the Court of Appeals will foster "forum shopping" because plaintiffs will seek to avoid state-imposed limitations on punitive damages. (Petition, 14-17; Brief of *Amici Curiae*, 3-6). Neither the petitioners nor the *amici*, however, explain why a federal court would be free to ignore the doctrine established in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), which requires a federal court to apply the state rules of decision to state law claims.

In determining whether punitive damages are available on state law claims, a federal court must apply the applicable state law of damages. *See, e.g., Cathey v. Johns-Manville Sales Corp.*, 776 F. 2d 1565, 1569 (6th Cir. 1985); *Jackson v. Johns-Manville Sales Corp.*, 781 F. 2d 394, 396-398 (5th Cir. 1986). If Illinois law in fact limits or bars punitive damages on causes of action such as those set forth in the pendent claims, then a federal district court applying Illinois law must abide by those limitations. Such limitations, however, cannot serve to deprive a federal court of its jurisdiction to hear the claim.

II.

THE JURY VERDICTS ON THE CIVIL RIGHTS CLAIMS IN FAVOR OF THE THREE GUARDS DID NOT DEPRIVE THE FEDERAL COURT OF ITS PENDENT CLAIM JURISDICTION.

The petitioners' concept of pendent jurisdiction would require automatic dismissal of state law claims whenever

the underlying federal cause of action is resolved favorably to the defendant. (Petition, 18-20). This Court has never adopted such a narrow view. In *Rosado v. Wyman,* 397 U.S. 397 (1970), the district court's retention of jurisdiction over the state law claims was upheld, notwithstanding the intervening mootness of the federal issue:

> "We are not willing to defeat the commonsense policy of pendent jurisdiction—the conservation of judicial energy and the avoidance of multiplicity of litigation—by a conceptual approach that would require jurisdiction over the primary claim at all stages as a prerequisite to resolution of the pendent claim."
>
> 397 U.S. at 405 (footnote omitted).

The petitioners' principal authority, *Bender v. Williamsport Area School District,* 475 U.S. —, 106 S. Ct. 1326 (1986), dealt with the very different issue of whether one member of a school board had standing to appeal from a declaratory judgment entered against the board. 106 S. Ct. at 1328. That decision had nothing to do with the subject of pendent jurisdiction, and it certainly did not overrule *Rosado,* either expressly or by implication.

In addition to the *Rosado* factors of "conservation of judicial energy and the avoidance of multiplicity of litigation," the Seventh Circuit opinion expresses one other compelling rationale for the retention of pendent claim jurisdiction—the impact of the applicable Illinois statute of limitations. 780 F. 2d at 657 (Petitioners' Appendix, A-17—A-18). Contrary to the petitioners' suggestion, retention of pendent claim jurisdiction in this context is neither extraordinary nor a departure from precedent. The same result has been reached by the Fifth, Eighth, and Eleventh Circuits. *Rheaume v. Texas Department of Public Safety,*

666 F. 2d 925, 931-932 (5th Cir. 1982), *cert. denied,* 458 U.S. 1106 (1982); *Hess v. St. Joseph Police Pension Fund,* 788 F. 2d 1344, 1346-1347 (8th Cir. 1986); *Emory v. Peeler,* 756 F. 2d 1547, 1555 (11th Cir. 1985).

Petitioners Hartgrove, Krug, and Tipton cannot rely on the jury verdicts to destroy the federal court's jurisdiction of the pendent claims. Under the rule of *Rosado,* those claims survive, and should be adjudicated in accordance with the decision of the Seventh Circuit.

III.

THE SEVENTH CIRCUIT DECISION DOES NOT STRIP THE DISTRICT COURT OF ITS DISCRETION TO DECLINE PENDENT JURISDICTION IN APPROPRIATE CASES.

The petitioners and the *amici* accuse the Seventh Circuit of having established an "absolute" or "immutable" rule mandating the exercise of pendent jurisdiction, and depriving the district court of its discretion to decline such claims. (Petition, 21; Brief of *Amici Curiae,* 7). Neither adjective is accurate. In *United Mine Workers of America v. Gibbs,* 383 U.S. 715 (1966), this Court said that there might be "situations in which the state claim is so closely tied to questions of federal policy that the argument for exercise of pendent jurisdiction is particularly strong." 383 U.S. at 727. In this case, the Seventh Circuit found an "almost complete factual overlap between the main and pendent claims." 780 F. 2d at 656 (Petitioners' Appendix, A-16). In this context, discretion should be exercised in favor of retention.

If anything, the Seventh Circuit has laid down a rule that requires a district court to exercise its discretion in ac-

cordance with the principles announced in *Gibbs*. For instance, in *Graf v. Elgin, Joliet and Eastern Ry. Co.*, 790 F. 2d 1341 (7th Cir. 1986), the Court of Appeals wrote:

> "The exercise of pendent jurisdiction is discretionary, and the discretion runs both ways: discretion (almost unreviewable) to relinquish the jurisdiction, but also discretion to assert it (provided of course that the pendent claim really is the pendant of some colorable federal claim) in appropriate cases even when the federal claims have fallen out before trial.
>
> . . . . .
>
> Judicial economy, the essential policy behind the modern doctrine of pendent jurisdiction which *Gibbs* created, supports the retention of pendent jurisdiction in any case where substantial judicial resources have already been committed, so that sending the case to another court will cause a substantial duplication of effort."
>
> 790 F. 2d at 1347-1348.

The petitioners and *amici* both rely on *Moor v. County of Alameda*, 411 U.S. 693 (1973), for the proposition that a district court has virtually unfettered discretion to decline the exercise of pendent jurisdiction. Their argument ignores the subsequent decision of this Court in *Hagans v. Lavine*, 415 U.S. 528 (1974), in which Justice White wrote for the Court:

> "[I]t is evident from *Gibbs* that pendent state law claims are not always, or even almost always, to be dismissed and not adjudicated. On the contrary, given advantages of economy and convenience and no unfairness to litigants, *Gibbs* contemplates adjudication of these claims."
>
> 415 U.S. at 545-546.

As noted by the Court of Appeals, there is an "almost complete factual overlap" between the civil rights and pendent claims. Viewed together, these claims constitute one "case" under *Gibbs*, and it is proper that they be adjudicated in the same court.

CONCLUSION

In its ruling on the pendent claims issue, the Seventh Circuit is correct. There is no Eleventh Amendment bar to the exercise of pendent jurisdiction in this case, and that jurisdiction survives and these claims should be adjudicated in accordance with the opinion.

Upon close scrutiny, the arguments of the petitioners and the *amici* fail. To accept their arguments would encourage the legislatures of the fifty states to develop fifty different rules of jurisdiction. Such a result would be abhorrent to the Constitution. For the reasons set forth, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

J. STEVEN BECKETT
RENO, O'BYRNE & KEPLEY, P.C.
P.O. Box 693
Champaign, IL 61820

JOHN L. SWARTZ
GIFFIN, WINNING, LINDNER, COHEN & BODEWES, P.C
P.O. Box 2117
Springfield, IL 62705

REX L. REU
LOREN THOMSON
THOMSON, WEINTRAUB & THOMPSON
P.O. Box 3577
Bloomington, IL 61702

JEFFREY D. FREDERICK
JOHNSON, FRANK, FREDERICK & WALSH
129 West Main
Urbana, IL 61801

ABRAHAM N. GOLDMAN
ABRAHAM N. GOLDMAN & ASSOC.
407 South Dearborn Street
Suite 1000
Chicago, IL 60605

COUNSEL FOR RESPONDENTS

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No. 85-1806

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

NEIL F. HARTIGAN
Attorney General, State of Illinois
ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000
Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694
* Counsel of Record

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INTRODUCTION

In this case the District Court held that the prisoners' pendent state claims were jurisdictionally barred by the Eleventh Amendment. (App. D-1) The District Court alternatively held, as a discretionary matter, that a jury trial of the twenty-one prisoners' legally diverse federal and state claims against each of the six defendants was simply not practical. (Tr. 1004)

The Seventh Circuit reversed and reinstated the pendent state law claims. *Duckworth v. Franzen*, 780 F.2d 645 (7th

Cir. 1985) The Court of Appeals held that the question of the real defendant in interest is governed by federal law even though state law supplies the substantive rule of decision. The Court of Appeals further held that the District Court had grossly abused its discretion in declining pendent jurisdiction on grounds of potential jury confusion and impracticality. (*Id.* at 656). Finally, the Seventh Circuit held, prior to this Court's decision in *Bender v. Williamsport Area School District*, 475 U.S. ____, 106 S.Ct. 1326 (1986), that pendent claims dismissed by the District Court may be reinstated by the Court of Appeals against all six defendants despite the plaintiffs' failure to appeal the underlying federal claims against three of those defendants. (*Id.* at 657).

I.

A CONFLICT EXISTS AS TO WHETHER THE SUPREMACY CLAUSE REQUIRES THE APPLICATION OF FEDERAL LAW TO DETERMINE THE REAL PARTY IN INTEREST QUESTION IN THE CONTEXT OF A STATE LAW CLAIM.

The prisoners argue that to apply state law in determining whether state officials or the State itself is the real party in interest in the context of a state law claim "would shift to the states the power to fix [the federal court's] jurisdiction." (Respondents' Brief In Opposition, p. 2) Such a result, the prisoners contend, would violate the Constitution's Supremacy Clause. (*Id.*)

Initially, it must be admitted that the lower courts are in great disagreement as to whether a claim nominally brought against a state official is to be considered a claim against a sovereign State for purposes of the Eleventh Amendment bar. Indeed, this Court recently noted that it had not been entirely consistent in its treatment of the real party in interest question, but did not resolve the

issue. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 101 (1984).

The lack of clear guidelines governing the real defendant in interest question is dramatically illustrated in this case where the prisoners contend they have brought personal capacity claims against the state corrections officials. Yet the basis of the prisoners' allegations is that defendants are liable for allegedly violating a statute setting forth a requirement that the Illinois Department of Corrections establish rules and regulations; the statute nowhere refers to any particular individual's responsibility. Ill.Rev.Stat. ch. 38, par. 1003-7-4. Moreover, the prisoners' complaints certainly appear to allege typical official capacity claims. See the prisoners' complaint set forth at App. E-5 to E-13. Most importantly, the District Court held that under Illinois law the State of Illinois is the real party in interest on the pendent claims. (App. D-2).

The prisoners' Supremacy Clause argument conflicts directly with this Court's holding in *Pennhurst* (465 U.S. at 104-106) that federal supremacy is not implicated where a plaintiff alleges that a state official is acting contrary to state law only. Accordingly, certain of the prisoners' citations are inapposite because they concern only federal claims where federal supremacy is obviously implicated; they do not, however, concern pendent state claims. See, e.g., *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984), *cert. denied*, 469 U.S. ____, 105 S.Ct. 810 (1985); *Downing v. Williams*, 624 F.2d 612 (5th Cir. 1980), *vacated on other grounds*, 645 F.2d 1226 (5th Cir. 1981).

Significantly, the Seventh Circuit's holding in this case is squarely at odds with the District of Columbia Circuit's very recent decision in *Morris v. Washington Metropolitan Area Transit Authority*, 781 F.2d 218, 223 (D.C. Cir. 1986) which applied state law in determining whether the defendant could properly claim Eleventh Amendment immunity.

The prisoners cite cases which reject the proposition that a state indemnity statute by itself is sufficient to convert a claim against a state official in his individual capacity into a claim against a State. See, e.g., *Wilson v. Beebe*, 770 F.2d 578, 587-88 (6th Cir. 1985) (state indemnity statute does not make the State the real party in interest). But that contention is not what is at issue in this case in that defendants no longer rely on the Illinois indemnification statute. Rather, the defendants' position is that the real party in interest issue is necessarily determined by state law which is independent of the indemnification question. See *People ex rel. Maciuba v. Cheston*, 25 Ill.App.3d 224, 323 N.E.2d 40 (1st Dist. 1974) (State was the real party in interest in tort suit although state officials were the only named defendants).

Indeed, the District of Columbia Circuit in the *Morris* case made this very distinction in rejecting a voluntary subsidy as a basis for Eleventh Amendment immunity (781 F.2d at 227), yet held other state law determinative of whether the State was the real party in interest. (*Id.* at 223).

Finally, the prisoners argue that there will be no forum shopping for punitive damages in federal court even though punitive damages are not available in the state forum, the Illinois Court of Claims. According to plaintiffs, the federal court must apply Illinois damage law regardless of the governing jurisdictional law. (Respondents' Brief In Opposition, p. 7) Yet this argument only reveals the utter inconsistency of plaintiffs' position—the identical pendent claim may be treated as an individual capacity claim for jurisdictional purposes under federal law and as an official capacity claim for purposes of remedy under state law. This Court never intended to sacrifice the fundamental concerns of comity and federalism to an all-consuming Su-

premacy Clause which encompasses and alters every state law claim brought in federal court. *Hagans v. Lavine*, 415 U.S. 528, 548 (1974) (emphasizing consideration of comity in context of pendent state claim).

Contrary to plaintiffs' contention (Respondents' Brief In Opposition, pp. 5-6), the Supremacy Clause nowhere mandates that a state prisoner be allowed to sue a corrections official in federal court on a state law claim even though the identical claim against the same official may not be brought in an Illinois court of general jurisdiction. Acceptance of the prisoners' position would virtually put the Illinois Court of Claims out of business; the federal courts through their pendent jurisdiction would take over the bulk of the litigation against the State. This Court should take this case to reaffirm that the purpose of the Constitution's Supremacy Clause is to preserve, not to destroy, the independent authority of each sovereign State's judicial system over state law claims.

II.

CONFUSION EXISTS AMONG THE LOWER COURTS AS TO WHETHER THE EXISTENCE OF PENDENT JURISDICTION NEED BE EVALUATED SOLELY AT THE START OF THE LAWSUIT OR THROUGHOUT THE LITIGATION.

The Seventh Circuit reinstated the pendent state law claims against the three prison guards despite the plaintiffs' failure to appeal the underlying federal claims against the guards. *Duckworth v. Franzen*, 780 F.2d 645, 657 (7th Cir. 1985). This result is in direct conflict with *Safeco Insurance Co. of America v. Guyton*, 692 F.2d 551, 556 (9th Cir. 1982) which held that the existence of pendent jurisdiction must be evaluated anew by the Court of Appeals based upon the claims appealed to it.

Plaintiffs' reliance on *Rosado v. Wyman*, 397 U.S. 397 (1970) (Respondents' Brief In Opposition, p. 8) is misplaced in that *Rosado* concerned a situation in which the federal claim became moot due to the operation of law. In this Court's words, it was "a matter beyond the control of the parties." (*Id.* at 404). In contrast, plaintiffs' failure to appeal the adverse decisions on the underlying federal claims in this case was not "a matter beyond the control of the parties"; rather, it resulted from plaintiffs' voluntary decision. Consequently, this case is similar to *Bender v. Williamsport Area School District*, 475 U.S. ____, 106 S.Ct. 1326, 1335 (1986) where this Court dismissed the lawsuit for want of Article III jurisdiction where the proper parties had also voluntarily decided not to appeal.

Moreover, *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966) makes clear that it is particularly appropriate to dismiss the pendent claims where, as here, the state law claims constitute the real body of the case and the federal claim is a mere appendage. A federal court need not "tolerate a litigant's effort to impose upon it what is in effect only a state law case." (*Id.* at 727). The plaintiffs' federal claims against the prison guards, which plaintiffs chose not to appeal, are precisely the type of insubstantial federal claim which this Court had in mind in the just-quoted passage from *Gibbs*.

III.

CONFUSION EXISTS AMONG THE COURTS OF APPEALS AS TO THE APPROPRIATE DEGREE OF DEFERENCE TO BE ACCORDED A DISTRICT COURT'S DISCRETIONARY DECISION TO DECLINE PENDENT JURISDICTION FOR PRACTICAL REASONS.

The prisoners suggest that *Rosado v. Wyman*, 397 U.S. 397 (1970) and *Hagans v. Lavine*, 415 U.S. 528 (1974), sup-

port the Seventh Circuit's reversal of the District Court's decision to decline pendent jurisdiction on the ground of potential jury confusion and impracticality in this case with legally diverse federal and state claims involving twenty-seven parties. But *Rosado* does not support the Seventh Circuit's decision. To the contrary, *Rosado* held the District Court in that case had correctly exercised its discretion with respect to the pendent claims (397 U.S. at 401); thus, this Court reinstated the District Court's decision. Similarly, in *Hagans*, this Court reinstated the District Court's pendent jurisdiction decision which had been overturned by the Court of Appeals. Moreover in *Hagans*, this Court emphasized that there was no single factor which should control the exercise of discretion in retaining or declining pendent jurisdiction, rather the court should look to all the relevant circumstances. (415 U.S. at 548-50). See also, *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-29 (1966).

Most significantly, the Seventh Circuit's decision in this case holding that regardless of the practical reasons favoring dismissal of the pendent state claims, a District Court must retain pendent jurisdiction whenever a substantial factual overlap exists between the federal and state claims overlooks this Court's consistent policy to rely upon the sound discretion of the District Court. Cf. *Evans v. Jeff D.*, 475 U.S. ____, 106 S.Ct. 1531, 1545 (1986) (District Court has discretion to make determinations on a case-by-case basis in the light of all the relevant circumstances).

The Courts of Appeals are in need of this Court's guidance concerning the proper degree of deference to be accorded a District Court's discretionary decision to decline pendent jurisdiction for practical reasons.

CONCLUSION

As the prisoners concede, the issues in this case concern each and every one of the fifty states. (Respondents' Brief In Opposition, p. 11) They arise every time a state official is sued on a state law claim in federal court. In each of the thousands of lawsuits each year involving pendent claims against state officials, it is necessary to determine whether the State is the real party in interest. This case offers this Court an opportunity to resolve whether federal or state law controls the real party in interest determination.

This case also presents the question of whether an insubstantial underlying federal claim abandoned by the plaintiffs in the District Court can nevertheless provide the basis for the Court of Appeals' reinstatement of previously dismissed pendent state claims against those same defendants.

Finally, this Court should provide guidance to the lower courts as to whether a District Court may properly decline pendent jurisdiction on practical grounds despite an alleged factual overlap between plaintiffs' federal and state claims.

For the foregoing reasons and for the reasons set forth by the amici curiae, petitioners respectfully pray that this Court grant their Petition for a Writ of Certiorari and allow full review of the Seventh Circuit's decision reinstating the pendent claims. Alternatively, petitioners pray that this Court grant their Petition and either summarily reverse the judgment of the Seventh Circuit reinstating the pendent state claims, or vacate the judgment of the Seventh Circuit as to the reinstatement of the pendent

claims and remand this case for reconsideration in light of this Court's recent decision in *Bender v. Williamsport Area School District.*

Respectfully submitted,

NEIL F. HARTIGAN
Attorney General, State of Illinois

ROMA JONES STEWART
Solicitor General, State of Illinois
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601
(312) 917-3000

Attorneys for Petitioners

JEFFREY W. FINKE*
Assistant Attorney General
General Law Division
100 West Randolph Street, 13th Floor
Chicago, Illinois 60601
(312) 917-5694

* Counsel of Record

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BRIEF OF THE STATE OF INDIANA AND THE COMMONWEALTHS AND STATES OF DELAWARE, FLORIDA, IOWA, LOUISIANA, MARYLAND, NEW JERSEY, OKLAHOMA

LINLEY E. PEARSON
Attorney General of Indiana

WILLIAM E. DAILY
Deputy Attorney General

Office of Attorney General
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 232-6351

Central Publishing Company, Inc., Indianapolis, IN 46206

Honorable Charles M. Oberly
Attorney General of Delaware
820 North French Street, 8th Floor
Wilmington, Delaware 19801

Hon. Jim Smith
Attorney General of Florida
State Capitol
Tallahassee, Florida 32301

Honorable Linley E. Pearson
Attorney General of Indiana
219 State House
Indianapolis, Indiana 46204

Honorable Thomas J. Miller
Attorney General of Iowa
Hoover Building — Second Floor
Des Moines, Iowa 50319

Honorable William J. Guste, Jr.
Attorney General of Louisiana
2-3-4 Loyola Building
New Orleans, Louisiana 70112

Honorable Stephen H. Sachs
Attorney General of Maryland
Seven North Calvert Street
Baltimore, Maryland 21202

Honorable W. Cary Edwards
Attorney General of New Jersey
Richard J. Hughes Justice Complex,
CN080
Trenton, New Jersey 08625

Honorable Michael Turpen
Attorney General of Oklahoma
112 State Capitol
Oklahoma City, Oklahoma 73105

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No. 85-1806

IN THE

Supreme Court of the United States

October Term, 1985

GAYLE FRANZEN, in his capacity as Director of the Illinois Department of Corrections, et al.,

Petitioners,

vs.

JUNIOR RAY DUCKWORTH, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

INTEREST OF AMICI CURIAE

Amici curiae are states which collectively are responsible for litigating and paying the judgments and attorneys' fees in many thousands of federal suits where

pendent state claims have been filed against their employees. These claims cover the vast range of state activities including law enforcement, corrections, licensing, and employment.

The ruling below (i) increases costs to the states, (ii) discourages pretrial settlements of civil rights cases having pendent state claims, and (iii) removes from consideration as a matter of law the possibility that juries may become confused by jury instructions covering widely divergent legal theories of liability and damages.

As institutional litigants, amici believe that not only has their sovereignty been seriously undermined and their treasuries' solvency been made even more precarious, but also our system of justice has sustained serious harm in that federal district courts are now forced to hear state law claims irrespective of practical reasons suggesting that a state forum is preferable.

CONSTITUTIONAL PROVISIONS

The Tenth Amendment to the United States Constitution provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to States respectively, or to the people.

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals' Decision Rejects Longstanding Comity Concerns By Imposing Greater Damages On A State For State Law Claims Tried In Federal Court Than If The Same Claims Were Tried In The State's Own Forum

The Eleventh Amendment recognizes "the problems of federalism inherent in making one sovereign appear against its will in the courts of the other." *Employees v. Missouri Dept. of Public Health and Welfare*, 411 U.S. 279, 294 (1973) (Marshall, J., concurring) Yet unless reversed by this Court, the lower court's decision permits plaintiffs to recover more from a state on state law claims against state employees in federal court than the plaintiffs would receive had they filed the identical claims in state court.

Virtually every state has legislative or judicially imposed limitations on damage awards for claims arising out of its employees' alleged tortious acts or omissions. (See Addendum) For example, Indiana prohibits a judgment for punitive damages and limits a judgment for damages to $300,000 for any single person and to $5,000,000 for all persons arising out of any single occurrence. Ind. Code. 34-4-16.5-4. However, the Indiana tort claims act expressly applies these limitations to public employees acting within the scope of their employment. Ind. Code 34-4-16.6-3(c). That is, under Indiana's tort claims act, the State is the real party in interest in a claim against a state employee. *Dept. of Commerce v. Glick*, 175 Ind. App. 449, 455, 372 N.E.2d 479, 483-84 (1978).

The Seventh Circuit's holding that the state employee individually rather than the state is the real party in interest on a pendent state claim not only strips the state of its Eleventh Amendment immunity in federal court, it also effectively eliminates state law limitations on damage awards.

Although the federal court may rely on the legal fiction

that the suit is against the individual employee, the state cannot. No one will work for a state if by doing so he or she is subjected to personal financial risk by limitless money damages suits. This is particularly true of persons in the sensitive areas of law enforcement and corrections who are the subject of frequent lawsuits. The state necessarily must step in to defend and pay any judgment against their employees who are acting within the scope of their employment as defined by state law regardless of whatever legal fiction may be used in determining the real party in interest question in federal court.

The Seventh Circuit held that a state could not properly argue that its agreement to indemnify its employees is of legal significance in determining whether the Eleventh Amendment applies. *Duckworth v. Franzen*, 780 F.2d 645, 650-51 (7th Cir. 1985)

But that analysis misperceives the issue. The issue before this Court on the certiorari petition is whether the real party in interest question in the context of a pendent state law claim against state employees is governed by federal law where there is no dispute that state law controls the real party in interest question in state court. Significantly, the Seventh Circuit's holding is in direct conflict with this Court's decision in *Ford Motor Co. v. Dept. of Treasury of Indiana*, 323 U.S. 459 (1945) that state law should be used to determine the applicability of the Eleventh Amendment where state concerns are at issue.

The Seventh Circuit's holding wholly ignores the doctrine of comity. Rather than permitting each state to act on state law matters in accord with its own law the Seventh Circuit decision undermines state sovereignty. By incorrectly determining the real party in interest issue, the Court of Appeals also effectively abolishes the limitations on judgments for money damages established by the legislature or judiciary in virtually every state. It is one thing for a federal court to erode a state's sovereignty in the context of a federal claim; it is something completely

different, however, to hold that a federal court may destroy state sovereignty in the context of a pendent state claim.

Indeed, the lower court's holding is no less than a frontal assault upon the Tenth Amendment to the United States Constitution which reserves powers not delegated to the United States to each of the sovereign states. More than a century ago, this Court affirmed the concept of federalism under our dual sovereignty system of constitutional government:

> [T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence.... [I]n many articles of the Constitution the necessary existence of the States and, within their proper spheres, the independent authority of the States, is distinctly recognized.

Lane County v. Oregon, 74 U.S. (7 Wall.) 71, 76 (1869). More recently, this Court has emphasized that no branch of the federal government may "usurp traditional state functions." *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 687 (1982).

This Court should grant certiorari in order to examine whether the state's laws should be needlessly usurped by the federal courts on the basis of a legally incorrect decision that federal law applies in determining whether the state is the real party in interest in the context of a state law claim against a state employee. See *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726 (1966) (state law governs pendent state claim).

The need for this Court to resolve whether the federal courts may sweep away damage limitations set by state legislators and state courts is particulary critical at this time. Federal aid to the states is falling dramatically and the cost of liability insurance to governmental entites is skyrocketing. Some governmental liability insurance has simply disappeared from the market. See, e.g., *Cities*

Besieged, 71 A.B.A.J. 19 (Dec. 1985). This is the worst possible time for federal courts to needlessly and unconstitutionally expand the states' damage liability.

II. The Requirement That State Law Claims Be Tried Together With Federal Claims Will Discourage Settlement Of Cases Before Trial

The Seventh Circuit's ruling purportedly seeks to promote judicial economy by requiring that federal and state claims be tried together in the federal forum provided the claims are based on overlapping factual issues. (780 F.2d at 656) Unfortunately, the actual result of the decision will be to waste scarce judicial resources by discouraging pretrial settlement. Permitting federal civil rights claims and state claims to be routinely tried together discourages state defendants from settling before trial in the hope that the jury or judge will find defendants not liable on the civil rights claims and thereby not liable for any attorneys' fees. *Buero v. Trierweiler*, 616 F.Supp. 1414, 1417 (E.D. Mich. 1985) citing *Smith v. Robinson*, 468 U.S. ____, ____ n. 12, 104 S.Ct. 3457, 3468 n. 12 (1984).

The hope of a no-liability finding on the civil rights claim and thus not having to pay attorneys' fees is particularly realistic given this Court's recent decision in *Daniels v. Williams*, 474 U.S. ____, 106 S.Ct. 662 (1986) which holds that proof of negligence is insufficient to support a finding of liability in a due process case. It thus pays institutional defendants, such as amici, to avoid settlement before trial in that fees under 42 U.S.C. §1988 are almost always assessed when the plaintiff obtains some relief in a pretrial settlement involving some fee claims and some non-fee claims. *Maher v. Gagne*, 448 U.S. 122, 132-33 (1980).

Consequently, amici ask this Court to grant certiorari in this case to examine whether it is in the best interest of the federal judicial system for the federal courts to create procedures which needlessly discourage pretrial settlement of a class of cases which represent a significant share of the entire federal civil caseload.

III. A Rule That Potential Jury Confusion In Assessing Divergent Legal Theories Is Simply Not A Problem Is Contrary To This Court's Express Holdings; It Is Also Contrary To Human Experience.

The lower court's unsupported conclusion that potential jury confusion arising from differing standards of liability and damages has never been thought a source of serious confusion (780 F.2d at 656) is utterly at odds with this Court's landmark decision on the factors governing a district court's decision to retain or dismiss pendent state claims. In *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 726-28 (1966) this Court expressly held that the district court judge should consider the possibility of jury confusion in treating divergent legal theories of liability and relief in deciding whether to retain or dismiss the pendent state claims. Similarly, in *Moor v. County of Alameda*, 411 U.S. 693, 716 (1973) this Court affirmed the trial court's dismissal of pendent state claims where the jury trial "could become unduly complicated."

Moreoever, the Seventh Circuit's holding that potential jury confusion is simply not a problem as a matter of law cannot be supported by actual experience, particularly in a large multi-party, multi-claim case. An experienced district court judge should be permitted to assess whether the jury potentially could be confused by, for example, instructions calling for use of a comparative fault analysis with respect to the state claims but not with respect to the federal claims. Similarly, where negligence claims are tried together with due process or Eighth Amendment claims, a jury may easily be confused by one instruction that states negligence is not enough for a finding of liability on the civil rights claim yet another instruction a short time later that states negligence is sufficient for a finding of liability on the pendent claim.

Rather than an immutable legal rule holding that jury confusion is simply not a problem, the determination of

whether a likelihood of jury confusion exists calls for the informed exercise of a district court's discretion on a case-by-case basis.

This Court should grant certiorari in order to clarify whether the district court may properly rely on practical reasons in declining to try pendent state claims.

CONCLUSION

This case raises important and recurring Eleventh Amendment and Article III pendent jurisdiction issues.

The Court of Appeals' decision conflicts with at least three decisions of this Court, namely, *Ford Motor Co. v. Department of Treasury of Indiana*, 323 U.S. 459 (1945), *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Moor v. County of Alameda*, 411 U.S. 693 (1973).

The Seventh Circuit's decision not only strips states of their Eleventh Amendment immunity, it also ignores federalism and comity concerns embodied in the Tenth Amendment by usurping virtually every state's legislative or judicial decisions which have set limits on damage judgments for state-law tort suits against state employees. This decision, which seriously undermines our dual sovereignty system of government, comes at a time of dramatic declines in federal aid and a crisis in the cost and availability of liability insurance.

The Court of Appeals' decision not only harms amici states, it also harms all other litigants as well as the federal judicial system itself by discouraging pretrial settlement of civil rights cases with pendent state claims in the hope of avoiding payment of attorneys' fees.

Finally, this Court should examine whether it is in the best interest of the federal judicial system to force federal district courts to try federal and state claims together in every case where common factual issues exist regardless of potential jury confusion or other practical reasons favoring a state forum.

Certiorari should be granted and the case set down for briefing and argument. Alternatively, certiorari should be granted and the Seventh Circuit decision should be summarily reversed on the authority of the three cases cited in this conclusion.

Respectfully submitted,

LINLEY E. PEARSON
Attorney General of Indiana

William E. Daily
Deputy Attorney General

ADDENDUM

Selected Statutes and Decisions

The following statutes limit the award of actual and/or punitive damages against a State or its employees acting within the scope of their employment as defined by state law.

Alaska Stat. §09.50.280 (1965) (no punitive damages)

Ariz. Rev. Stat. Ann. §12-820.04 (Supp. 1985) (no punitive damages)

Ark. Const. Art. 5, §20 (sovereign immunity provision)

Cal. Govt. Code §818 (1980) (no punitive damages)

Colo. Rev. Stat. §24-10-114 (1982) (no punitive damages; limit on actual damages)

Del. Const. Art. I, §9 (sovereign immunity provision)

Fla. Stat. §768.28 (Supp. 1986) (no punitive damages; limit on actual damages)

Ga. Const. Art. I, Sec. II (sovereign immunity provision)

Haw. Rev. Stat. §662-2 (1976) (no punitive damages)

Idaho Code §6-918 and §6-926 (1948 and Supp. 1985) (no punitive damages; limit on actual damages)

Ill. Rev. Stat. ch. 37, par. 439.8 (1985) (limit on actual damages)

Ind. Code §34-4-16.5-4 (1981) (no punitive damages; limit on actual damages)

Iowa Code §25A.4 (Supp. 1985) (no punitive damages)

Kan. Stat. §75-6105 (1984) (no punitive damages; limit on actual damages)

Ky. Rev. Stat. §44.070 (1980) (limit on actual damages)

La. Rev. Stat. §13:5106 (Supp. 1986) (limit on actual damages)

Me. Rev. Stat. tit. 14, §8105 (1980) (no punitive damages; limit on actual damages)

Md. State Gov't Code Ann. 12-104 (1985) (no punitive damages)

Mass. Ann. Laws G.L. ch. 258, §2 (1980) (no punitive damages; limit on actual damages)

Minn. Stat. §3.736 (Supp. 1985) (no punitive damages; limit on actual damages)

Miss. Code. Ann. §11-46-15 (Supp. 1985) (no punitive damages; limit on actual damages)

Mo. Rev. Stat. §537.610 (Supp. 1985) (no punitive damages; limit on actual damages)

Mont. Code Ann. §§2-9-105, 2-9-107 (1985) (no punitive damages; limit on actual damages)

Nev. Rev. Stat. §41.035 (1985) (no punitive damages; limit on actual damages)

N.H. Rev. Stat. Ann. §541-B:14 (Supp. 1985) (no punitive damages; limit on actual damages)

N.J. Rev. Stat. §59:9-2 (1982) (no punitive damages)

N.M. Stat. Ann. §41-4-19 (1982) (no punitive damages; limit on actual damages)

N.C. Gen. Stat. §143-291 (1983) (limit on actual damages)

N.D. Cent. Code §32-12.1-03 (Supp. 1985) (limit on actual damages)

Okla. Stat. tit. 51, §154 (Supp. 1978) (no punitive damages; limit on actual damages)

Or. Rev. Stat. §30.270 (1983) (no punitive damages; limit on actual damages)

Pa. Stat. Ann. tit. 42, §8528 (1982) (limit on actual damages)

R.I. Gen. Laws. §9-31-2 (1985) (limit on actual damages)

S.D. Comp. Laws. Ann. §21-32-16 (Supp. 1985) (limit on actual damages)

Tex. Rev. Civ. Stat. Ann. art. 6252-19 (Supp. 1985) (no punitive damages; limit on actual damages)

Utah Code Ann. §§63-30-22, 63-30-34 (1978 and Supp. 1985) (no punitive damages; limit on actual damages)

Vt. Stat. Ann. tit. 12, §5601 (1973) (limit on actual damages)

Va. Code §8.01-195.3 (1984) (no punitive damages; limit on actual damages)

Wis. Stat. Ann. §893.82 (Supp. 1985) (no punitive damages; limit on actual damages)

Wyo. Stat. §1-39-118 (Supp. 1985) (no punitive damages; limit on actual damages)

The following judicial decisions either bar punitive damages in any case or bar punitive damages or any damages from being assessed against a governmental entity or public employees acting within the scope of their employment as defined by state law.

State v. Inman, 239 Ala. 348, 195 So. 448 (1940)

Smith v. District of Columbia, 336 A.2d 831 (D.C. App. 1975)

City of Chicago v. Langlass, 52 Ill. 256 (1869)

Breaux v. Simon, 235 La. 453, 104 So.2d 168 (1958)

Ray v. City of Detroit, 67 Mich. App. 702, 242 N.W.2d 494 (1976)

Abel v. Conover, 170 Neb. 926, 104 N.W.2d 684 (1960)

Buck v. Hooker Chemicals & Plastics Corp., 117 Misc. 2d 496, 458 N.Y.S. 2d 134 (1982)

Drain v. Kosydar, 54 Ohio St. 2d 49, 374 N.E.2d 1253 (1978)

Feingold v. Southeastern Pa. Transportation Authority, 339 Pa.Super 15, 488 A.2d 284 (1985)

Belue v. City of Spartanburg, 276 S.C. 381, 280 S.E.2d 49 (1981)

Austin v. City of Memphis, 684 S.W.2d 624 (Tenn. Ct. App. 1984)

Willett v. Village of St. Albans, 69 Vt. 330, 38 A. 72 (1897)

Skidmore v. Seattle, 138 Wash. 340, 244 P. 545 (1926)

Wilson v. City of Wheeling, 19 W. Va. 323 (1882)